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Title: Dynel McMillan, Lorna Peterson, James J. Dennison and Harold L. Smalls, Petitioner
v.
Pennsylvania

Court: Supreme Court of Pennsylvania, Eastern District

Counsel for petitioner: Stein,Gerald A., Sosnov,Leonard N.

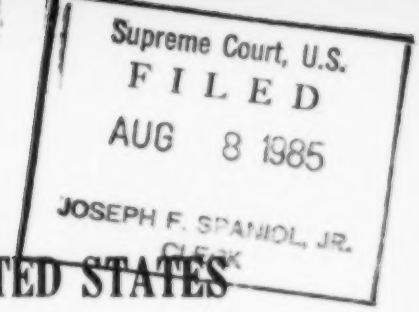
Counsel for respondent: Barthold,Gaele McLaughlin, Cooperstein,Steven J.

ntry	Date	Note	Proceedings and Orders
1	Aug 8 1985	G	Petition for writ of certiorari filed.
2	Sep 11 1985		DISTRIBUTED. September 30, 1985
3	Sep 12 1985	X	Brief of respondent Pennsylvania in opposition filed.
4	Oct 7 1985		Petition GRANTED.
			**********
5	Oct 31 1985		Record filed.
7	Nov 7 1985		Order extending time to file brief of petitioner on the merits until December 2, 1985.
8	Dec 2 1985		Brief of petitioners Dynel McMillan, et al. filed.
9	Dec 2 1985		Joint appendix filed.
11	Dec 12 1985		Order extending time to file brief of respondent on the merits until January 13, 1986.
12	Jan 7 1986		SET FOR ARGUMENT, Tuesday, March 4, 1986. (4th case).
13	Jan 13 1986		Brief of respondent Pennsylvania filed.
14	Jan 23 1986		CIRCULATED.
15	Jan 31 1986		Record filed.
16	Feb 20 1986	X	Reply brief of petitioners Dynel McMillan, et al. filed.
17	Mar 4 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

85-215

No.____



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

COMMONWEALTH OF PENNSYLVANIA
v.

DYNEL MCMILLAN, *Petitioner*
LORNA PETERSON, *Petitioner*
JAMES J. DENNISON, *Petitioner*
HAROLD L. SMALLS, *Petitioner*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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I. STATEMENT OF QUESTIONS INVOLVED

1. Does a state violate due process requirements when it provides by statute that proof by only a preponderance of the evidence of a specific discrete fact involved in the commission of the offense — possession of a firearm — suffices to mandate the imposition of five to ten years of imprisonment?

2. Does Pennsylvania's Mandatory Sentencing Act which provides for a judicial determination of the critical fact of whether the defendant possessed a firearm during the commission of the offense violate a defendant's constitutional right to trial by jury?

3. Does Pennsylvania's Mandatory Sentencing Act violate due process of law by granting the prosecutor unbridled, standardless discretion to decide after a finding of guilty, whether a defendant is to be sentenced pursuant to the provisions of an act mandating at least five to ten years imprisonment or whether he is to be sentenced under an otherwise applicable individualized sentencing statute which permits a judge to consider all appropriate information concerning the offender and the offense, and to choose from a variety of sentencing alternatives?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Dynel McMillan, Lorna Peterson, James J. Dennison and Harold L. Smalls, petitioners, by John Packel, Esquire, Defender Association of Philadelphia, attorneys for Dynel McMillan and Harold L. Smalls, Gerald A. Stein, Esquire, and Needleman, Needleman, Caney, Stein & Kratzer, Ltd., attorneys for Lorna Peterson, and Mary McNeill Zell, Esq. attorney for James J. Dennison, petition for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

IV. OPINIONS IN COURT BELOW

On June 10, 1985, in a judgment and as yet unreported opinion in the case of *Commonwealth v. Sandra L. Wright*, et. al (petitioners McMillan, Peterson, Dennis-

son, and Smalls), the Pennsylvania Supreme Court held that Pennsylvania's Mandatory Sentencing Firearms Act, 42 Pa.C.S.A. §9712, was constitutional. This opinion is attached as Exhibit "A".

The lower courts in the case of each petitioner had held 42 Pa.C.S.A. §9712 to be unconstitutional. The unreported opinion by Philadelphia Common Pleas Court Judge Murray C. Goldman in the case of petitioner McMillan was issued on February 2, 1984, and is attached as Exhibit "B". The unreported opinion by a three judge panel of Philadelphia Common Pleas Court judges consisting of the Honorable Bernard J. Avellino, John L. Braxton, and Nelson Diaz in the case of petitioner Dennison was issued on May 1, 1984, and is attached as Exhibit "C". The unreported opinion of Philadelphia Common Pleas Court judge Nicholas M. D'Alessandro in the case of petitioner Smalls was issued on February 29, 1984, and is attached as Exhibit "D". The Honorable David N. Savitt of the Philadelphia Common Pleas Court who held the act unconstitutional in petitioner Peterson's case, did not issue an opinion.

V. JURISDICTIONAL STATEMENT

Jurisdiction is conferred by 28 U.S.C. §1257(3). On June 10, 1985 petitioner's cases were jointly decided by the judgment and opinion of the Pennsylvania Supreme Court. This petition for writ of certiorari is timely filed because it was mailed within 60 days of June 10, 1985. Rule 20.1.

VI. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment, United States Constitution

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Fourteenth Amendment, Section 1, United States Constitution

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 Pa.C.S.A. §9712. Sentences for offenses committed with firearms.

> (a) Mandatory Sentence. -Any person who is convicted in any court of this Commonwealth of murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery as defined in 18 Pa.C.S.A. §3701 (a)(1)(i), (ii) or (iii) (relating to robbery), aggravated assault as defined in 18 Pa.C.S.A. §2702 (a)(1) (relating to aggravated assault) or kidnapping, or who is convicted of attempt to commit any of these crimes, shall, if the person visibly possessed a firearm during the commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary.

(b) Proof at sentencing. -Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

(d) Appeal by Commonwealth. -If a sentencing court refuses to apply this section where applicable, the Commonwealth shall have the right to appellate review of the act of the sentencing court. The appellate court shall vacate the sentence and remand the case to the sentencing court for imposition of a sentence in accordance with this section if it finds that the sentence was imposed in violation of this section.

(e) Definition of firearm. -As used in this section "firearm" means any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive or the expansion of gas therein.

42 Pa.C.S.A. §9721. Sentencing generally

(a) General rule. -In determining the sentence to be imposed the court shall, except where a mandatory minimum sentence is otherwise provided by law, consider and select one or more of the following alternatives, and may impose them consecutively or concurrently:

(1) An order of probation.

(2) A determination of guilt without further penalty.

(3) Partial confinement.

(4) Total confinement.

(5) A fine.

(b) General standards. -In selecting from the alternatives set forth in subsection (a) the court shall follow the general principle that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant. The court shall also consider any guidelines for sentencing adopted by the Pennsylvania Commission on Sentencing and taking effect pursuant to Section 2155 (relating to publication of guidelines for sentencing). In every case in which the court imposes a sentence for a felony or misdemeanor, the court shall make as a part of the record, and disclose in open court at the time of sentencing, a statement of the reason or reasons for the sentence imposed. In every case where the court imposes a sentence outside the sentencing guidelines adopted by the Pennsylvania Commission on Sentencing pursuant to Section 2154 (relating to adoption of guidelines for sentencing) and made effective pursuant to Section 2155, the court shall provide a contemporaneous written statement of the reason or reasons for the deviation from the guidelines. Failure to comply shall be grounds for vacating the sentence and resentencing the defendant.

(c) Restitution. -In addition to the alternatives set forth in subsection (a) of this section the court may

order the defendant to compensate the victim of his criminal conduct for the damage or injury that he sustained.

(d) Detailed criteria. -With respect to each alternative the criteria to be considered by the court are set forth in this subchapter.

(e) Term of imprisonment. -All sentences of imprisonment imposed under this chapter shall be for a definite term.

VII. STATEMENT OF THE CASE

Each petitioner was found guilty of criminal offenses in the Philadelphia Common Pleas Court. In each case the Commonwealth filed a notice that it would seek sentencing pursuant to the provisions of Pennsylvania's Mandatory Sentencing Firearms Act, 42 Pa.C.S.A. §9712, which requires the imposition of a mandatory term of imprisonment of from five to ten years[1] if found to be applicable. In each case, the lower court refused to hold a hearing pursuant to 42 Pa.C.S.A. §9712, because it held that the act was unconstitutional. Each petitioner was sentenced pursuant to the discretionary non-mandatory sentencing provisions of 42 Pa.C.S.A. §9721 which are applicable to all criminal cases in Pennsylvania, except for those where mandatory sentencing provisions are invoked and applied. Respondent, the Commonwealth of Pennsylvania, appealed each of the cases to the Pennsylvania Supreme Court, and they were consolidated along with another case (*Commonwealth v. Sandra Wright,* No. 4, E.D. Appeal Docket 1984). On June 10, 1985, the Pennsylvania Supreme Court, in a judgment and opinion (Exhibit "A"), held that 42

1. The Act provides that a minimum sentence of at least five years must be imposed, and Pennsylvania law requires that the minimum sentence be no greater than one half of the maximum sentence imposed. 42 Pa.C.S.A. §9756(b).

Pa.C.S.A. §9712 was constitutional, vacated the judgments of sentences in petitioners' cases, and remanded them for resentencing pursuant to 42 Pa.C.S.A. §9712. The individual circumstances of each petitioner's case were as follows:

Petitioner McMillan was arrested by Philadelphia police on November 17, 1982 and charged with offenses in connection with the shooting of Jeffrey Baker. Informations were returned against him by the District Attorney of Philadelphia charging him with possession of an instrument of crime, aggravated assault, simple assault, recklessly endangering another person, and violations of the Uniform Firearms Act (Nos. 2543-2546, December Term, 1982). He was tried before the Honorable Murray C. Goldman and a jury, with his trial commencing on August 2, 1983. The Commonwealth proceeded to trial only on the charges of aggravated assault, simple assault and possession of an instrument of crime. On August 4, 1983, the jury returned verdicts of not guilty of simple assault, and guilty of aggravated assault, felony of the second degree, and possession of an instrument of crime. On January 30, 1984, Judge Goldman sentenced petitioner McMillan to a term of from three to ten years imprisonment on the aggravated assault charge, and a concurrent term of imprisonment of from two and a half to five years imprisonment on the possession of an instrument of crime charge.

Petitioner Peterson was arrested by Philadelphia police on September 2, 1982 and charged with offenses in connection with the shooting death of her husband Major Peterson. The District Attorney of Philadelphia returned Informations against her, charging her with murder and possession of an instrument of crime (Nos. 1038-1040, September Term, 1982). On November 10, 1983, petitioner Peterson waived her right to a jury trial, and was tried by the Honorable David N. Savitt. Judge Savitt found her guilty of voluntary manslaughter and possession of an instrument of crime. On March 21,

1984, Judge Savitt sentenced petitioner Peterson to a term of imprisonment of from one to six years on the voluntary manslaughter charge and a concurrent six to eighteen months sentence on the possession of an instrument of crime charge.

Petitioner Dennison was arrested on July 30, 1983, and charged by Philadelphia police with shooting Edward Zinni. The District Attorney of Philadelphia returned Informations against him, charging him with aggravated assault, possession of an instrument of crime, and violations of the Uniform Firearms Act (Nos. 1306-1309, August Term, 1983). On January 23, 1984, he waived his right to trial by jury, and was tried before the Honorable Bernard J. Avellino who found him guilty of aggravated assault, felony of the second degree, possession of an instrument of crime, and carrying a firearm on a public street. On May 10, Judge Avellino sentenced petitioner Dennison to concurrent terms of eleven and a half to twenty-three months imprisonment on the aggravated assault and possession of an instrument of crime charges. No sentence was imposed on the charge of carrying a firearm on the public street which was held to have merged for sentencing purposes.

Petitioner, Smalls, was arrested on June 22, 1982 by Philadelphia police and charged with offenses in connection with the gunpoint robbery of In Sok Hyon. The District Attorney of Philadelphia returned Informations against him, charging him with violations of the Uniform Firearms Act, robbery, theft, possession of an instrument of crime, recklessly endangering another person, and criminal conspiracy (Nos. 1631-1636, August Term, 1982). On March 18, 1983, petitioner Smalls waived his right to a jury trial and was tried before the Honorable Nicholas M. D'Alessandro who found him guilty of all charges, including robbery, felony of the first degree. On September 23, 1983, Judge D'Alessandro sentenced petitioner Smalls to a term of imprisonment of from four to eight years imprisonment on the robbery charge. He also

received concurrent terms of imprisonment of from four to eight years on the criminal conspiracy charge, two and a half to five years for the Uniform Firearms Act charges, and one to two years for the recklessly endangering another person charge. Sentence was suspended on the possession of an instrument crime charge, and no sentence was imposed on the theft charge which was held to have merged for sentencing purposes.

VIII. REASONS RELIED ON FOR GRANTING THE WRIT OF CERTIORARI

A. PROOF BY PREPONDERANCE OF THE EVIDENCE

The instant petition for a writ of certiorari should be granted because these cases present the important question of whether the due process requirement of proof of guilt beyond a reasonable doubt, as guaranteed by *In Re Winship*, 397 U.S. 358 (1970), is dependent solely on how a legislature chooses to define its crimes, or whether there are constitutional limitations on the legislature's prerogative which have been exceeded by Pennsylvania's Mandatory Sentencing Act, 42 Pa.C.S.A. §9712.

The possession of a firearm or deadly weapon while committing a crime has traditionally and consistently been recognized in Pennsylvania and virtually every other jurisdiction as an element of the offense in defining particular crimes which must be established beyond a reasonable doubt. What these criminal statutes recognize is that such possession of a firearm or other offensive weapon during the commission of a crime is an important fact concerning the manner in which the crime was committed, which critically increases the defendant's culpability in the eyes of the law, often causing the offender to be subjected to a higher grade offense

and/or more severe penalty.[2]

The Pennsylvania legislature, has taken that factual determination, possession of a firearm during the commission of an offense, and placed it in a sentencing statute which explicitly provides that it is not an element of the offense and need be established by only a preponderance of the evidence.[3]

2. See *e.g.*, 18 Pa.C.S.A. §2701 (a)(2); 18 Pa.C.S.A. §2702 (a)(4); 18 Pa.C.S.A. §2703; 18 Pa.C.S.A. §2704; 18 Pa.C.S.A. §5121 (d)(1)(ii); 18 Pa.C.S.A. §5501 (3). Exhibit "E" to this petition contains an incomplete list of the many such assault, robbery and burglary statutes currently in force in almost every jurisdiction in the United States which have possession of a firearm or deadly weapon during the commission of the offense as an element of the offense.

In addition, at least fifteen jurisdictions have explicit separate criminal offenses for possessing, carrying, or using a firearm or deadly weapon during the commission of certain enumerated offenses. *Delaware Code Annotated*, §1447; *D.C. Code*, §22-3202; *Code of Georgia Annotated*, §26-9908a; *Maryland Annotated Code*, Article 27 §36B(d); *Michigan Compiled Law Annotated*, §750.227b; *Missouri Annotated Statutes*, §571.015; *Nebraska Revised Statutes*, §28-1205; *New Hampshire Revised Statutes Annotated*, §650-A: 1; *New York Penal Law*, §265.08 and §265.09; *Rhode Island General Law*, §11-47-3; *S.D. Codified Laws Annotated*, §22-14-12 and §22-14-13; *Tenn. Code Annotated*, §39-6-1710; *Vermont Statutes Annotated*, §4005; *Code of Virginia*, §18.2-53.1; *Wyoming Statutes*, §6-8-101.

Likewise, there is a federal statute entitled "Penalties," 18 U.S.C. §924(c), which provides for an enhanced sentence if a firearm has been used or carried during the commission of any offense, which has been uniformly interpreted, despite its denomination, as creating a separate offense which must be established beyond a reasonable doubt at trial. *E.g.*, *United States v. Dixon*, 558 F.2d 919 (9th Cir. 1977); *United States v. Eagle*, 539 F.2d 1166 (8th Cir. 1976); *United States v. Sidduth*, 457 F.2d 1198 (10th Cir. 1972).

3. Every other state, except New Jersey, which has an enhanced or mandatory sentencing statute triggered by proof of possession of a firearm during the commission of an offense requires either by statute or judicial construction that proof of the fact be beyond a reasonable doubt. *Iowa Code Annotated*, §902.7; *Oregon Revised Statutes*, §161.60; *Huf v. State*, 675 P.2d 268 (Alaska App. 1984); *State v. Tongate*, 613 P.2d 121 (Wash. 1980) (en banc); *Streeter v. State*, 416 So.2d 1203 (Fla. Ct. App. 1982); *State v.*

A sentencing hearing pursuant to the Mandatory Sentencing Act bears no relationship to the usual sentencing hearing where a judge is given great discretion in the information and factors he considers at the hearing, and in deciding on a particular term and kind of sentence to be imposed from a variety of sentencing alternatives which are available. See *Williams v. People of State of New York*, 337 U.S. 241, 246, 247 (1949). A hearing held under Pennsylvania's Mandatory Sentencing Act is in reality no different than a criminal trial, as a judge must confine himself to the question of whether the government has presented sufficient evidence of the fact at issue involved in the offense,[4] and may not consider any other factors or information. If the fact is established by a preponderance of the evidence there is no choice in sentencing alternatives, as the defendant must then be sentenced to at least five to ten years imprisonment.[5]

Parker, 46 Ohio App. 2d 189, 347 N.E. 2d 546 (1973). New Jersey's statute (N.J.S.A. 2C: 43-6 c, d), like Pennsylvania's, requires proof by only a preponderance of the evidence. A trial judge in New Jersey has held the statute constitutional, and his decision was affirmed on other grounds by an intermediate appellate court. *State v. Gantt*, 186 N.J. Super. 262, 452 A.2d 477 (1982), affd. 195 N.J. Super. 114, 478 A.2d 422 (App. Div. 1984). Fifteen trial judges in Pennsylvania had held the mandatory sentencing act now under review unconstitutional before the Pennsylvania Supreme Court reached a contrary conclusion.

4. The determination by the judge at sentencing is *de novo*, and independent of the verdicts on charges at trial that may involve a determination of whether a defendant possessed a firearm. Deleted from the final enactment was a provision in an earlier version of the proposed statute which provided that a finding of guilt for certain offenses would be dispositive of the sentencing issue. The Act, as promulgated, requires the judge to consider the trial evidence and any other evidence which either side may present at the sentencing hearing.

5. Since an individual is not eligible for parole in Pennsylvania until he has served his minimum sentence (61 P.S. §331.21), proof of this fact by a preponderance of the evidence means that the defendant must serve at least five years in prison. The five to ten years

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), this Court held, in relying on *In Re Winship, supra*, that Maine was constitutionally required to prove beyond a reasonable doubt the absence of heat of passion on sudden provocation in a homicide case, a traditional element of homicide offenses, rejecting Maine's attempt to define a single homicide offense, with the defense then having the burden of establishing the facts to reduce murder to voluntary manslaughter. *Winship* guarantees were held to apply even though the burden of proof issue did not go to guilt or innocence, but rather to the degree of punishment which the defendant might expect.

In *Patterson v. New York*, 432 U.S. 197 (1977), examining a New York statute which provided for an affirmative defense of extreme emotional disturbance in a murder prosecution, this Court subsequently held that the state did not have to prove the absence of this affirmative defense beyond a reasonable doubt.

> To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate. *Patterson v. New York*, 432 U.S. 197, 209 (1977). (Footnote omitted)

This case neither involves a mitigating factor, nor a fact which is peculiarly subject to difficulties of proof by the state. The Pennsylvania Supreme Court recognized that "visible possession of a firearm is a simple, straightforward issue susceptible of proof." Exhibit "A", p. 17,

NOTES *(Continued)*
imprisonment mandated by the Act obviously makes the act a much more onerous sentencing statute than the one usually applicable in Pennsylvania (42 Pa.C.S.A. §9721) which grants a judge the power to choose an appropriate sentence tailored to the individual case. This is demonstrated by the sentences each of the petitioners actually received pursuant to the non-mandatory sentencing act. see *e.g., Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Lindsey v. Washington*, 301 U.S. 397 (1937).

but upheld the constitutionality of the Act because it construed this Court's decisions in *Winship, Mullaney, and Patterson* to hold that the reasonable doubt standard applies only to the elements of an offense as defined by the legislature.

This Court should grant the instant petition to decide the important constitutional question of whether legislatures have *carte blanche* to do as Pennsylvania has done; to take a traditional element of the offense with very serious consequences flowing from the proof of that fact concerning the commission of the offense, and require proof by only a preponderance of evidence.[6]

This Court expressly noted, and cautioned in *Mullaney*, that the reasonable doubt standard mandated by *Winship* was not confined to the elements of offenses as defined by state law, for otherwise "elements" could simply be characterized as factors that bear solely on punishment thus avoiding the impact of *Winship*.[7] Presented here is the question of whether the decision in *Patterson*, which held that due process of law does not require proof beyond a reasonable doubt of the absence of mitigating factors, applies equally to proof of a specific aggravating fact[8] concerning the commission of the of-

6. Even in non-criminal contexts, where the interests at stake in a proceeding are important, and more substantial than the loss of money, this Court has held that statutes providing for proof of the critical facts by only a preponderance of the evidence violate due process of law. At least the intermediate standard of proof of by clear and convincing evidence was held to be constitutionally required rather than the preponderance standard, the lowest burden of proof known to the law. *Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights); *Addington v. Texas*, 441 U.S. 418 (1979) (involuntary committment).

7. *Mullaney* was reaffirmed and gven retroactive application in *Reed v. Ross*, __U.S.__, 104 S.Ct. 2901 (1984).

8. Without deciding the question presented here this Court has previously observed that the due process protections at sentencing must be increased when sentencing is dependent on a new finding of fact, "a radically different situation" than the usual sentencing proceeding. *Specht v. Patterson*, 386 U.S. 605, 608 (1967).

fense which mandates five to ten years imprisonment if established.[9]

Factual Determination By Judge Without Jury

This Court has held that in general there is of course no constitutional right to a jury determination at sentencing, because trial judges are more experienced than juries in sentencing, and trained to evaluate and weigh all of the various individual mitigating and aggravating circumstances concerning the background of the defendant, and the particular crime committed, in deciding on an appropriate sentence. See *Proffitt v. Florida*, 428 U.S. 242, 250-253, 267 (1976). However, it is equally well settled that a defendant has a constitutional right to a trial by jury on criminal charges, other than summary or petty offenses.[10] The question posed here is whether a defendant has a right to a jury at sentencng when the proceeding is like a trial, and totally dependent on the factual determination of a discrete objective fact involving the criminal charges. The Pennsylvania Mandatory Sentencing Act provdes only for a discrete factual findng by a judge at sentencing, with no right to a jury determination, and none of the usual judicial sentencing discretion. Whether a defendant visibly possessed a firearm during the criminal offense, the critical and sole factual

9. Every commentator who has examined this issue of first impression has concluded that the due process clause should be construed to require proof beyond a reasonable doubt when sentencing is dependent on proof of a specific objective fact concerning the crime charged, and the imposition of a mandatory or enhanced sentence will be imposed if the fact is established to the satisfaction of the factfinder. *E.g.*, Note, *Proposal For Determinate Sentencing In New York: The Effect On An Offender's Due Process Rights*, 8 Fordham Urban L.J. 629, 651 (1980); Note, *The Constitutionality Of Statutes Permitting Increased Sentences For Habitual Or Dangerous Offenders*, 89 Harv. L. Rev. 356, 383 (1975). Underwood, *Burdens Of Persuasion In Criminal Cases*, 86 Yale L. J. 1291, 1326-27, 1347 (1977).

10. See *e.g.*, *Duncan v. Louisiana*, 391 U.S. 145 (1968).

issue which will determine whether he receives a mandatory sentence is exactly the type of factual determination, involving the offense committed, on which defendants have always been held to have a right to a decision by a jury. There is a split of authority among state courts which have considered this issue of whether a mandatory or enhanced sentencing proceeding, dependent on proof of possession of a firearm during the commission of an offense, constitutionally entitles the defendant to a determination by a jury.[11] As with the constitutional question of the requisite burden of proof, this Court should decide whether it is dispositive of a defendant's constitutional rights that a state legislature has declared this factual determination, traditionally a trial finding, to be a matter for sentencing rather than trial.

Unbridled Standardless Discretion of Prosecutor To Choose Sentencing Scheme

This petition presents the question left open in *United States v. Batchelder*, 442 U.S. 114 (1979), of whether it is constitutionally permissible for a legislature to "empower the Government to predetermine ultimate criminal sanctions." Id., 442 U.S. at 125. Unlike *Batchelder*, and other cases which have held that the prosecutor may exercise total discretion over the charging function, as long as there is no individious discrim-

11. Most states have held on either state or federal constitutional grounds that an accused has a constitutional right to a jury determination of the factual question of whether a firearm was possessed during the commission of the offense. *State v. Overfelt*, 457 So.2d 1385 (Fla. 1984); *State v. Wedge*, 293 Or. 598, 652 P.2d 773 (1982); *State v. Blea*, 84 N.M. 595, 506 P.2d 337 (Ct. App. 1973); *People v. Najera*, 8 C.3d 504, 105 Cal. Rptr. 345, 503 P.2d 1353 (1972) (In Bank); *Johnson v. State*, 458 S.W.2d 409 (Ark. 1970). *Contra*, *Huf v. State*, 675 P.2d 268 (Alaska App. Ct. 1984); *State v. Mullins*, 223 Kan. 798, 577 P.2d 51 (1978).

ination or vindictive motivation,[12] the Pennsylvania Mandatory Sentencing Act does not involve the charging function, but prosecutorial control over the sentencing process.

The Pennsylvania Mandatory Sentencing Act provides that after a finding of guilt the prosecutor shall give notice if he intends to proceed under the Mandatory Sentencing Act. Thus, the prosecutor has unlimited discretion to decide which sentencing scheme will be applied to a defendant in Pennsylvania. If the prosecutor invokes the Mandatory Sentencing Act the judge may only consider one issue at sentencing, whether the defendant visibly possessed a firearm while committing the offense. If that fact is established he must impose a penalty of at least five to ten years imprisonment. If the act is not invoked, the sentencing proceeding is pursuant to 42 Pa.C.S.A. §9721, and a judge may consider all appropriate information concerning the offender and offense and choose from a variety of sentencing alternatives utilizing the discretion usually afforded judges in the sentencing process. See *Commonwealth v. Martin*, 466 Pa. 118, 351 A.2d 650 (1976).

Without a legislature yardstick to limit prosecutorial control over the sentencing process, the sentence a defendant receives is subject to the whim and caprice of the prosecutor, which should be held to be violative of due process of law.[13]

CONCLUSION

For each and every, or any, of the foregoing reasons, petitioners respectfully request that a writ of certiorari

12. See *e.g.*, *Bordenkircher v. Hayes*, 434 U.S. 363, 364 (1978); *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

13. See *State v. Cory*, 204 O.R. 235, 282 P.2d 1054 (1955). See also *Pierce v. Parratt*, 666 F.2d 1205 (8th Cir. 1981) (concurring opinion).

issue to the Pennsylvania Supreme Court to review the decision of that court.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH v.	:	No. 4 E.D. Appeal
SANDRA L. WRIGHT, *Appellant*	:	Docket 1984
COMMONWEALTH, *Appellant v.*	:	No. 28 E.D. Appeal
DYNEL McMILLAN	:	Docket 1984
COMMONWEALTH, *Appellant v.*	:	No. 62 E.D. Appeal
LORNA PETERSON	:	Docket 1984
COMMONWEALTH, *Appellant v.*	:	No. 101 E.D. Appeal
JAMES J. DENNISON	:	Docket 1984
COMMONWEALTH, *Appellant v.*	:	No. 106 E.D. Appeal
HAROLD L. SMALLS	:	Docket 1983
	:	
	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the sentences in the appeals at Nos. 28, 62, 101 and 106 are vacated and those cases remanded for resentencing pursuant to section 9712. The judgment of sentence in the appeal at No. 4 Eastern District Appeal Docket 1984 is affirmed.

BY THE COURT:

_____

Marlene F. Lachman, Esq.
Prothonotary

Dated: 6/10/85

[J-216-219-1984]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, *Appellee*	:	No. 4 E.D. Appeal Docket 1984
v.	:	Appeal from the Judgment of Sentence of the Court of Common Pleas of Chester County, Criminal Division, dated January 24, 1983, entered at No. 1444 of 1982
SANDRA L. WRIGHT, *Appellant*	:	
COMMONWEALTH OF PENNSYLVANIA, *Appellant*	:	No. 28 E.D. Appeal Docket 1984
v.	:	Appeal from the Judgment of Sentence of the Court of Common Pleas of Philadelphia, Trial Division, Criminal Section, dated January 30, 1984, entered at No. 2544 December Term, 1982
DYNEL McMILLAN, *Appellee*	:	
COMMMONWEALTH OF PENNSYLVANIA, *Appellant*	:	No. 62 E.D. Appeal Docket 1984
v.	:	Appeal from the Judgment of Sentence of the Court of Common Pleas of Philadelphia, Trial Division, Criminal Section, dated March 21, 1984, entered at No. 1039 September Session, 1982
LORNA PETERSON, *Appellee*	:	
COMMONWEALTH OF PENNSYLVANIA, *Appellant*	:	No. 101 E.D. Appeal Docket 1984
v.	:	Appeal from the Judgment of Sentence of the Court of Common Pleas of Philadelphia, Trial Division, Criminal Section, dated May 10, 1984, entered at No. 1306 August Session, 1983
JAMES J. DENNISON, *Appellee*	:	

COMMONWEALTH OF PENNSYLVANIA, *Appellant*	:	No. 106 E.D. Appeal Docket 1983
v.	:	Appeal from the Judgment of Sentence of the Court of Common Pleas of Philadelphia, Trial Division, Criminal Section, dated September 21, 1983, entered at No. 1632 August Session, 1982
HAROLD L. SMALLS, *Appellee*	:	
	:	ARGUED: December 6, 1984

OPINION

NIX, *C. J.* FILED: JUNE 10, 1985

The issue in these appeals is the constitutionality of section 9712 of the Mandatory Minimum Sentencing Act, 42 Pa. C.S. §9712, which requires the imposition of a minimum sentence of five years' total confinement upon persons found to have been in visible possession of a firearm during the commission of certain felonies. Each of the defendants was convicted of one of the section's enumerated offenses, and in each case the Commonwealth sought to proceed under the section. In four of these cases the trial court, holding the section unconsititutional, declined to apply it.[1] In the remaining

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1. In Commonwealth v. McMillan, No. 28 E.D., Appeal Docket 1984, appellee McMillan was convicted by a jury of aggravated assault, 18 Pa. C.S. §2702(a)(1), and possession of instruments of crime generally, 18 Pa. C.S. § 907(a). He was sentenced to concurrent terms of three to ten and two and one-half to five years respectively.

In Commonwealth v. Peterson, No. 62 E.D. Appeal Docket 1984, appellee Peterson was convicted after a bench trial of voluntary manslaughter, 18 Pa. C.S. §2503, and possession of instruments of crime generally. She received a sentence of one to six years on the manslaughter charge and a concurrent six to eighteen month sentence on the weapons count.

In Commonwealth v. Dennison, No. 101 E.D. Appeal Docket 1984, appellee Dennison was convicted by a judge of aggravated

case a constitutional challenge to the statute was rejected and the defendant was sentenced to a five-year term of imprisonment.[2]

I.

Section 9712, entitled "Sentences for offenses committed with firearms," provides as follows:

> (a) Mandatory sentence.—Any person who is convicted in any court of this Commonwealth of murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery as defined in 18 Pa. C.S. §3701(a)(1)(i), (ii) or (iii) (relating to robbery), aggravated assault as defined in 18 Pa. C.S. §2702(a)(1) (relating to aggravated assault) or kidnapping, or who is convicted of attempt to commit any of these crimes, shall, if the person visibly possessed a firearm during the commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary.

NOTES *(Continued)*

assault and possession of instruments of crime generally. Concurrent sentences of eleven and one-half to twenty-three months were imposed.

In Commonwealth v. Smalls, No. 106 E.D. Appeal Docket 1984, appellee Smalls was convicted after a bench trial of robbery, 18 Pa. C.S. § 3701(a)(1), and criminal conspiracy, 18 Pa. C.S. §903, for which he was sentenced to concurrent four to eight year terms. He was also convicted of violation of the Uniform Firearms Act, 18 Pa. C.S. §§6101 *et seq.*, and reckless endangerment, 18 Pa. C.S. §2705, for which he was sentenced to concurrent terms and two and one-half to five and one to two years respectively. Sentence was suspended on his conviction of possession of instruments of crime.

2. In Commonwealth v. Wright, No. 4 E.D. Appeal Docket 1984, appellee Wright pleaded guilty to the charge of robbery and was sentenced to five years imprisonment pursuant to 42 Pa. C.S. §9712.

> (b) Proof of sentencing.—Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.
>
> (c) Authority of court in sentencing.—There shall be no authority in any court to impose on an offender to which this section is applicable any lesser sentence than provided for in subsection (a) or to place such offender on probation or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a sentence greater than that provided in this section. Sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory sentences provided in this section.
>
> (d) Appeal by Commonwealth.—If a sentencing court refuses to apply this section where applicable, the Commonwealth shall have the right to apellate review of the action of the sentencing court. The appellate court shall vacate the sentence and remand the case to the sentencing court for imposition of a sentence in accordance with this section if it finds that the sentence was imposed in violation of this section.
>
> (e) Definition of firearm. — As used in this section "firearm" means any weapon (including a

> starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive or the expansion of gas therein.
>
> 42 Pa. C.S. §9712.

The constitutional challenge to section 9712 centers upon subsection (b)'s provision that the issue of the applicability of the statute, i.e., whether the defendant visibly possessed a firearm during the commission of the offense, is to be determined by a preponderance of the evidence. In the four appeals in which the section was declared constitutionally infirm, the trial court concluded that the preponderance standard violates due process. The rationale for those decisions is that visible possession of a firearm is an element of the crime for which the defendant is being sentenced and thus requires proof beyond a reasonable doubt. If that theory is correct the statute clearly violates due process and we need proceed no further. If, however, we conclude that visible possession of a firearm is not an element of the crime, we must determine whether proof of that fact by a preponderance of the evidence satisfies the Due Process Clause.

A.

We begin by noting that the legislature explicitly provided in section 9712(b) the "[p]rovisions of this section shall not be an element of the crime. . . ." 42 Pa. C.S. §9712(b). "Under our system of jurisprudence the legislature is charged with the responsibility of defining the elements of crimes." *Commonwealth v. Graves*, 461 Pa. 118, 126, 334 A.2d 661, 665 (1975). Moreover, as defined in the Crimes Code, an element of an offense is

> [s]uch conduct or such attendant circumstances or such a result of conduct as:

> (1) is included in the description of the offense;
>
> (2) establishes the required kind of culpability;
>
> (3) negatives an excuse or justification for such conduct;
>
> (4) negatives a defense under the statute of limitation; or
>
> (5) establishes jurisdiction or venue.
>
> 18 Pa. C.S. §103.

Visible possession of a firearm is neither included in the definitions of the felonies enumerated in section 9712(a) nor does it establish the culpability required under those definitions. *See* 18 Pa. C.S. §§2502(c), 2503, 2702(a)(1), 2901, 3121, 3123, 3701(a)(1)(i)-(iii). Subsections (3), (4) and (5) of the statutory definition of "element of an offense" are clearly inapplicable. Thus, under Pennsylvania law, even in the absence of an explicit statement by the legislature visible possession of a firearm could not be considered an element of the crime of which a defendant subject to section 9712 has been convicted.

B.

It is argued, however, that the section in effect creates a new set of upgraded felonies of which visual possession is a material element. We disagree. Section 9712 does not alter the degree of guilt as to the crimes to which it may be applied. Third degree murder, robbery as defined in 18 Pa. C.S. §3701(a)(1), kidnapping, rape and involuntary deviate sexual intercourse are felonies of the first degree subjecting the defendant to a maximum of twenty years' imprisonment. Voluntary manslaughter and aggravated assault as defined in 18 Pa. C.S. §2702(a)(1) are felonies of the second degree carrying a maximum sentence of ten years. Section 9712 neither

provides for an increase in these maximum sentences nor authorizes a separate sentence. It merely mandates a minimum sentence of five years, which may be greater or less than the minimum sentence which might otherwise be imposed.[3]

Moreover, section 9712 applies only in the event the defendant is convicted of one of the offenses enumerated therein and thus relates solely to the sentencing proceedings. The section in question removes from the sentencing court the discretion to decide whether total confinement is appropriate and whether to set a minimum sentence of less than five years. Visible possession of a firearm during the commission of the crime is a sentencing factor which, if found, is dispositive of those issues. The legislature has thus foreclosed the possibility of leniency to such gun-users. Thus we conclude that visible possession is not an element of the crimes specified in the section.

We reject the argument that *In re Winship*, 397 U.S. 358 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), compel a contrary conclusion. In *In re Winship, supra*, the United States Supreme Court, after discussing the vital role of the reasonable, doubt standard in the American scheme of criminal procedure stated:

> Lest there be any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.
>
> *Id.* at 364.

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3. We note that the instant statute, unlike the sentencing statute construed in Commonwealtth v. Glover, 397 Pa. 543, 547, 156 A.2d 114, 117 (1959), explicitly provides for a *minimum* sentence of five years, 42 Pa. C.S. §9712(a).

Language in a subsequent decision of that Court, *Mullaney v. Wilbur, supra*, appeared to indicate that *Winship* was not limited to the elements of the crime as defined by state law. *Id.* at 698, 699 n.24. *Mullaney* struck down a Maine homicide statute which provided for the single generic offense of felonious homicide with three "punishment categories" based on degree of culpability. Under the statute, as described by the Court, intent was not an element of the crime, having bearing only on the appropriate punishment category. As a result, "Maine could impose a life sentence for any felonious homicide — even one that traditionally might be considered involuntary manslaughter — unless the defendant was able to prove that his act was neither intentional nor criminally reckless." *Id.* at 699 (emphasis in original; footnote omitted). The Court held that the Due Process Clause required the prosecution to prove absence of heat of passion or sudden provocation beyond a reasonable doubt when the issue was properly presented. *Id.* at 704.

In *Patterson v. New York*, 432 U.S. 197 (1977), however, the Court declined to extend *Winship* to New York's affirmative defense of "extreme emotional disturbance," rejecting the argument that *Mullaney* held that "the State may not permit the blameworthiness of an act *or the severity of the punishment authorized for its commission* to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt." *Patterson v. New York, supra* at 214 (emphasis added). Rather the Court gave *Mullaney* a much narrower reading:

> *Mullaney* surely held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. This is

> true even though the State's practice, as in Maine, had been traditionally to the contrary. Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.
>
> *Patterson v. New York, supra* at 215.

While acknowledging the appropriateness of due process concerns in this area of law, the Court declined to intrude upon the State legislatures' authority to define offenses:

> Whenever due process guarantees are dependent upon the law as defined by the legislative branches, some consideration must be given to the possibility that legislative discretion may be abused to the detriment of the individual. *See Mullaney v. Wilbur,* 421 U.S., at 698-699. *The applicability of the reasonable-doubt standard, however, has always been dependent on how a state defines the offense that is charged in any given case;* yet there has been no great rush by states to shift the burden of disproving traditional elements of the criminal offenses to the accused.
>
> *Id.* at 211 n.12 (emphasis added).

Thus the Court refused to disturb its previous holdings that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt *all of the elements included in the definition of the offense of which the defendant is charged.*" *Id.* at 210 (emphasis added). Finding extreme emotional disturbance to be a separate issue which did not negative any elements of the crime which the State was required to prove, the Court rejected the due process challenge to the statute.

The *Patterson* Court cautioned, however, that the Due Process Clause precludes the states from discarding the presumption of innocence:

> "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland v. American Sugar Rfg. Co.,* 241 U.S. 79, 86 (1916). The legislature cannot "validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt." *Tot v. United States,* 319 U.S. 463, 469 (1943). See also *Speiser v. Randall,* 357 U.S., at 523-525. *Morrison v. California,* 291 U.S. 82 (1934), also makes the point with sufficient clarity.
>
> *Id.* at 210.

The United States Supreme Court decisions discussed above lend no support to the theory that visible possession should be deemed an element of the crimes punishable pursuant to section 9712. In making visible possession of a firearm a sentencing factor to be considered only after conviction of specified offenses, the legislature has in no way relieved the prosecution of its burden of proving guilt. Section 9712 creates no presumption as to any essential fact and places no burden on the defendant. Thus under *Winship, Mullaney* and *Patterson* the Due Process Clause does not require that visible possession be treated as an element of the underlying offense to be proved beyond a reasonable doubt.

II.

We must now consider whether proof by a preponderance of the evidence of a sentencing factor which, if established, mandates a minimum sentence of five years'

total confinement satisfies the requirements of due process. That the Due Process Clause is implicated in sentencing as well as guilt determination is no longer open to question.

> [I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. *Mempa v. Rhav*, 389 U.S. 128; *Specht v. Patterson*, 386 U.S. 605. The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. See *Witherspoon v. Illinois*, 391 U.S. 510, 521-523.
>
> *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (footnote omitted).

Although sentencing proceedings must comport with due process, the convicted defendant need not be accorded "the entire panoply of criminal trial procedural rights." *Id.* at 358 n.9. As the United States Supreme Court has explained:

> Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation to authority that due process is flexible and calls for such procedural protections as the particular situation demands. . . . Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.

Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

We are here concerned with the use of preponderance standard to determine the presence or absence of a statutory sentencing factor. The relevant due process considerations involved in determining the appropriateness of a standard of proof are cogently summarized in *Santosky v. Kramer*, 455 U.S. 745 (1982):

> In *Addington v. Texas*, 441 U.S. 418 (1979), the Court, by a unanimous vote of the participating Justices, declared: "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' " *Id.*, at 423, *quoting In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). *Addington* teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.
>
> Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a "fair preponderance of the evidence" standard indicates both society's "minimal concern with the outcome," and a conclusion that the litigants should "share the risk of error in roughly equal fashion." 441 U.S., at 423. When the State brings a criminal action to deny a defendant liberty or life, however, "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous

judgment." *Ibid.* The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected, *id.*, at 427, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos(e) almost the entire risk of error upon itself." *Id.*, at 424. See also *In re Winship*, 397 U.S., at 372 (Harlan, J., concurring).

The "minimum requirements [of procedural due process] being a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." *Vitek v. Jones*, 445 U.S. 480, 491 (1980). See also *Logan v. Zimmerman Brush Co.*, *ante*, at 432. Moreover, the degree of proof required in a particular type of proceeding "is the kind of question which has traditionally been left to the judiciary to resolve." *Woodby v. INS*, 385 U.S. 276, 284 (1966). "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.' " *Addington v. Texas*, 441 U.S., at 425, quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (CA4 1971) (opinion concurring in part and dissenting in part), cert. dism'd *sub nom. Murel v. Baltimore City Criminal Court*, 407 U.S. 355 (1972).

This court has mandated an intermediate standard of proof — "clear and convincing evidence" — when the individual interests at stake in a state proceeding are both "particularly important" and "more substantial than mere loss of money." *Addington v. Texas*, 441 U.S., at 424. Notwithstanding "the state's 'civil labels and good intentions,' " *id.*, at 427, quoting *In re Winship*, 397 U.S., at 365-366, the Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of

> government-initiated proceedings that threaten the individual involved with "a significant deprivationof liberty" or "stigma." 441 U.S., at 425, 426. See, *e.g.*, *Addington v. Texas*, *supra* (civil commitment); *Woodby v. INS*, 385 U.S., at 285 (deportation); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (denaturalization); *Schneiderman v. United States*, 320 U.S. 118, 125, 159 (1943) (denaturalization).
>
> *Id.* at 754-757 (footnote omitted).

In assessing section 9712's preponderance standard we must weigh the liberty interest of the defendant against the Commonwealth's interest in imposing a mandatory sentence and determine how the risk of error should be distributed between those two parties in the sentencing proceeding. *See id.* at 754; *Addington v. Texas*, 441 U.S. 418, 425 (1979); *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976).

The liberty interest of a defendant facing a sentencing proceeding pursuant to section 9712 is similar to that of other convicted defendants awaiting sentence. He stands convicted of a serious felony upon proof beyond a reasonable doubt. His right to remain free from confinement has thus been extinguished, *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1976); *Meachum v. Fano*, 427 U.S. 215, 224 (1976), and he is subject to punishment.

It is the province of the legislature to determine the punishment imposable for criminal conduct.[4] *Common-*

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4. For this reason the argument that section 9712 violates the separation of powers principle by depriving the sentencing court of discretion may be rejected out of hand. We must also decline the invitation to hold that section 9712 improperly delegates this legislative power to the executive by giving the prosecution discretion whether to invoke the mandatory sentencing procedure. We perceive no distinction between such an exercise of discretion and the prosecutorial discretion exercised at any other stage of the criminal

wealth v. Glover, 397 Pa. 543, 156 A.2d 114 (1959); *Commonwealth v. Redline*, 391 Pa. 486, 137 A.2d 472 (1958); *Commonwealth v. Cano*, 389 Pa. 639, 133 A.2d 800, *cert. denied and appeal dismissed*, 355 U.S. 182 (1957). The maximum penalties for the first and second degree felonies enumerated in section 9712 have been set at twenty (20) and ten (10) years respectively. 18 Pa. C.S. §§ 1103, 2502(c), 2503(c), 2702(b), 2901(b) 3121, 3123, 3701(b). The legislature has chosen to vest the courts with the discretion to prescribe within statutory limits the maximum and minimum sentence to be served. The defendant "has no substantive right to a particular sentence within the range authorized by statute." *Gardner v. Florida, supra* at 358. Thus regardless of whether section 9712 is invoked a defendant convicted of one of the crimes listed therein could be sentenced to a minimum sentence of five (5) years.

The effect of section 9712 is merely to limit the discretion of the sentencing court in the selection of a minimum sentence where it is determined that the defendant visibly possessed a firearm during the commission of the crime. The maximum permissible term of imprisonment remains unaffected. The defendant has no cognizable right to leniency. Thus although a finding that this particular sentencing factor is present may have serious consequences for the defendant, we do not believe that a defendant subject to a section 9712 proceeding is in a position significantly distinguishable from that of other convicted defendants during the sentencing phase.

The Commonwealth's countervailing interest in the imposition of a mandatory five (5) year sentence, on the other hand, is unquestionably important. The Commonwealth seeks to protect the public from armed criminals

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NOTES *(Continued)*

prosecution. The decision to accord the Commonwealth a measure of discretion as to whether to employ section 9712 in a given case was a proper exercise of legislative judgment.

and to deter violent crime and the illegal use of firearms generally, as well as to vindicate its interest in punishing those who commit serious crimes with guns. This societal interest is at least as compelling as the defendant's interest in lenient punishment.

Having weighed the respective individual and public interests at stake, we conclude that it is reasonable for the defendant and the Commonwealth to share equally in any risk of error which may be present in the factfinding process. In the context of a section 9712 proceeding, moreover, the risk of error is slight. Visible possession of a firearm is a simple, straightforward issue susceptible of objective proof. There is scant potential that suspicion and conjecture will enter into the factfinder's decision. In addition, evidence of visible possession is amenable to meaningful appellate review. Thus we are convinced that the preponderance standard satisfies the minimum requirements of due process as employed in the legislature's mandatory sentencing scheme.

The decisions of the United States Supreme Court in which a heightened standard of proof has been mandated are clearly distinguishable. Unlike cases in which a fundamental liberty interest is at stake, *e.g., Santosky v. Kramer, supra* (involuntary termination of parental rights); *Addington v. Texas, supra* (involuntary commitment to mental institution); *Wooby v. I.N.S.*, 385 U.S. 276 (1966) (deportation); *Chaunt v. United States*, 364 U.S. 350 (1960) (loss of citizenship), here the defendant's fundamental right, i.e., freedom from confinement, has already been forfeited. The determination to be made will at most have bearing on the duration of confinement, a question which has traditionally been committed to the discretion of the sentencing court. The fact that the finding of a discreet fact has been made crucial to the determination of the minimum sentence the defendant must serve does not magnify the stature of his individual interest. As we have indicated, the defendant has no right to avoid punishment and no right to a

particular punishment within the pertinent statutory range. Thus we reject the notion that an intermediate standard of proof such as "clear and convincing evidence" is dictated by the circumstances of a section 9712 proceeding.

III.

For all of the above reasons,[5] we hold that section 9712 satisfies the minimum requirements of the Due Process Clause. Since we have upheld the constitutionality of section 9712 the sentences in the appeals at Nos. 28, 62, 101 and 106 Eastern District Appeal Docket 1984 must be vacated and those cases remanded for resentencing pursuant to section 9712. The judgment of sentence in the appeal at No. 4 Eastern District Appeal Docket 1984 must be affirmed.

So ordered.

Mr. Justice Larsen joins in this opinion and files a concurring opinion.

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5. For additional arguments supporting this view see the concurring opinion of Mr. Justice Larsen, Commonwealth v. Wright, et al., ___Pa. ___, ___, ___A.2d ___, (J-216-219-1984; filed June 10, 1985) (Larsen, J., joining and concurring), in which I join.

[J-216-219-1984]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, *Appellee*	:	No. 4 E.D. Appeal Docket 1984
v.	:	Appeal from the Judgment of Sentence of the Court of Common Pleas of Chester County, Criminal Division, dated January 24, 1983, entered at No. 1444 of 1982
SANDRA L. WRIGHT, *Appellant*	:	
COMMONWEALTH OF PENNSYLVANIA, *Appellant*	:	No. 28 E.D. Appeal Docket 1984
v.	:	Appeal from the Judgment of Sentence of the Court of Common Pleas of Philadelphia, Trial Division, Criminal Section, dated January 30, 1984, entered at No. 2544 December Term, 1982
DYNEL McMILLAN, *Appellee*	:	
COMMONWEALTH OF PENNSYLVANIA, *Appellant*	:	No. 62 E.D. Appeal Docket 1984
v.	:	Appeal from the Judgment of Sentence of the Court of Common Pleas of Philadelphia, Trial Division, Criminal Section, dated March 21, 1984, entered at No. 1039 September Session, 1982
LORNA PETERSON, *Appellee*	:	
COMMONWEALTH OF PENNSYLVANIA, *Appellant*	:	No. 101 E.D. Appeal Docket 1984
v.	:	Appeal from the Judgment of Sentence of the Court of Common Pleas of Philadelphia, Trial Division, Criminal Section, dated May 10, 1984, entered at No. 1306 August Session, 1983
JAMES J. DENNISON, *Appellee*	:	

COMMONWEALTH OF PENNSYLVANIA,	:	No. 106 E.D. Appeal Docket 1983
Appellant	:	
	:	Appeal from the Judgment of
v.	:	Sentence of the Court of Com-
	:	mon Pleas of Philadelphia,
HAROLD L. SMALLS,	:	Trial Division, Criminal Sec-
Appellee	:	tion, dated September 21,
	:	1983, entered at No. 1632 Au-
	:	gust Session, 1982
	:	
	:	ARGUED: December 6, 1984

CONCURRING OPINION

JUSTICE ROLF LARSEN FILED: JUNE 10, 1985

Society can not tolerate the tyranny of armed felons. Recognizing this, the legislature wisely enacted legislation providing for a mandatory minimum five-year jail term for those who visibly use a firearm in the commission of the following serious felonies: "[m]urder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery as defined in 18 Pa.C.S. § 3701 (a)(1)(i)(ii) or (iii) (relating to robbery), aggravated assault as defined in 18 Pa. C.S. § 2702(a)(1) (relating to aggravated assault) or kidnapping, or who is convicted of attempt to commit any of these crimes . . ." 42 Pa.C.S.A. § 9712(a). It is intended, and it is reasonable to believe, that application of the Mandatory Sentencing Act will deter the dangerous and intimidating use of firearms by felons in the perpetration of crimes. A lengthened incarceration for felons who make visible use of firearms in the execution of their criminal deeds tends to have the effect of maintaining in the citizenry, much needed confidence in our criminal justice system.

The principal issue before the court in this appeal is the challenge to the constitutionality of the standard of

proof set forth in the Mandatory Sentencing Act.[1] It is argued that the preponderance of the evidence standard, which is prescribed by the Act to determine whether the convicted felon visibly possessed a firearm during the commission of the crime, is constitutionally deficient. I, as the majority with whom I join, find no merit in this argument. I write separately, however, to express my views regarding this important issue and to expand upon the reasons for holding that the preponderance standard is the constitutionally proper standard of proof.

Under the terms of the Act, visible possession of a firearm during the commission of one of the specified offenses is not an element of the underlying crime, nor does it constitute a separate offense calling for a separate penalty. Statutorily, visible possession of a firearm is a sentencing factor to be determined by the trial judge after conviction. Proof of that factor triggers the Act and makes mandatory a sentence which could have otherwise been pronounced within the discretion of the court.[2] Proof by "a preponderance of the evidence" satisfies due process and is an appropriate standard in

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1. 42 Pa.C.S.A. § 9712(b) provided:

Proof at sentencing.—Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. *The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necesary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.* (Emphasis added).

2. The act restricts the judge's discretion to be lenient in imposing sentence. When the statute is applicable, the court lacks authority to place a convicted offender on probation or to suspend sentence. 42 Pa.C.S.A. §9712(c).

establishing visible possession of a firearm as a sentencing factor. *See State v. Gantt*, ____N.J. Super. ____, 452 A.2d 477 (1982), *affirmed*, 195 N.J. Super. 114, 478 A.2d 422 (App. Div. 1984).[3]

> "Three standards of proof are generally recognized, ranging from the 'preponderance of the evidence' standard employed in most civil cases, to the 'clear and convincing' standard reserved to protect particularly important interests in a limited number of civil cases, to the requirement that guilt be proved 'beyond a reasonable doubt' in a criminal prosecution. *See Addington v. Texas*, 441 U.S. 418, 423-424 (1979)."

California v. Mitchell Bros. Santa Ana Theatre, 454 U.S. 90, 93 ____S.Ct. ____, ____(1981).

> The function of a stardard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.

Addington v. Texas, 441 U.S. at ____.

In a criminal trial in this Commonwealth an accused can only be convicted of a crime by proof beyond a reasonable doubt. It is only after this heavy burden is met by the Commonwealth that any consideration of the statutory sentencing factor — visible possession of a firearm — is appropriate.

> "[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirement of due process."

Gardner v. Florida, ____U.S. ____, 97 S.Ct. 1197, 1204 (1977).

> "The fact that due process applies [at sentencing] does not, of course, implicate the entire panoply of criminal trial procedural rights."

Id at ____, 97 S.Ct. at 1205 n. 9. *See also Commonwealth v. Riggins*, 474 Pa. 115, 126, 377 A.2d 140, ____(1977).

> Due process is a flexible concept. What process is due depends upon the circumstances of each case, including the nature of the interests that are at stake and the particular proceeding in question. *See Groppi v. Leslie*, 404 U.S. 496, 500, 92 S.Ct. 582, 585, 30 L.Ed.2d 632 (1972); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 894-95, 81 S.Ct. 1743, 1748-49, 6 L.Ed.2d 1230 (1961); *Hannah v. Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960); *Commonwealth v. Mayberry*, 459 Pa. 91, 102, 327 A.2d 86, 92 (1974).

In re Martorano, 464 Pa. 66, 74, 346 A.2d 22, ____ (1975).

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3. In *Gantt*, the New Jersey Superior Court held that the "preponderance of the evidence" standard fixed by the New Jersey Mandatory Sentence Statute was a constitutionally proper measure of proof. The relevant section of the New Jersey statute provides:

> d. The court shall not impose a mandatory sentence pursuant to subsection c. of this section, 2C:43-7c. or 2C:44-3d., unless the ground therefor has been established at a hearing. At the hearing, which may occur at the time of senencing, the prosecutor *shall establish by a preponderance of the evidence* that the weapon used or possessed was a firearm. In making its finding, the could shall take judicial notice of any evidence, testimony or information adduced at the trial, plea hearing, or other court proceedings and shall also consider the presentence report and any other relevant information. (Emphasis added).

N.S.S.A. 2C:43-6d.

The interests at stake here are the convicted criminal's interest in obtaining a light or lenient penalty for his crime as opposed to society's twofold interest in: (a) sure and certain incarceration for those who crimes with guns, and (b) deterring the illegal use of firearms in the Commonwealth. In assessing these divergent interests, it is important to keep in mind that the defendant has already been found guilty of criminal conduct calling for some form of punishment. By his conviction the defendant has forfeited his right to remain free in society and is subject to incarceration. Proof of visible possession of a firearm by a preponderance of the evidence at the time of sentence based upon that conviction is a fair standard and is the process due in these circumstances. The Commonwealth has a legitimate interest in protecting its citizens from dangerous criminals who use firearms in the commission of violent crimes. A heavier burden of proof is not constitutionally required to impose a statutorily mandated minimum sentence.

Proof by the preponderance of the evidence is the standard approved in a variety of proceedings involved in some manner with criminal defendants. A review of case law, both Pennsylvania and federal, which, in such instances, accredited and applied the preponderance standard shows that the same test is constitutionally sufficient in determining visible possession of a firearm under the Act.

In the case of *Jones v. United States*, 403 U.S. 354 (1983) the United States Supreme Court approved a District of Columbia statute which provided for commitment to a mental hospital of a criminal defendant who is found not guilty by reason of insanity. Under the D.C. statute, a defendant who interposes an insanity defense is required to establish his insanity only by a preponderance of the evidence. The Court concluded "that a finding of not guilty by reason of insanity is a sufficient foundation for commitment of an insanity acquittee for the purposes of treatment and the protection of society."

Id. The defendant argued that under *Addington*, [v. Texas, 441 U.S. 418 (1979)] he could only be committed upon proof by clear and convincing evidence. The defendant contended his commitment, therefore, which was based upon a finding of insanity by a preponderance of the evidence, violated due process. The Court, in rejecting defendant's argument, said:

> "[s]ince automatic commitment under the [D.C. Statute] follows only if the *acquittee himself* advances insanity as a defense and proves that his criminal act was a product of his mental illness, there is good reason for diminished concern as to the risk of error."

Id. at ____, 130 S.Ct. at ____. The Court concluded that because concerns vital to its holding in *Addington* do not appear in the case of an insanity acquittee, there is little reason for applying the clear and convincing standard of proof in both instances. "The preponderance of the evidence standard comports with due process for commitment of insanity acquittees." *Id.* at ____103 S.Ct. at ____.

Proof by a preponderance of the evidence is the settled standard applied in suppression hearings, both in the federal courts and Pennsylvania courts, when evidence is challenged on constitutional grounds. A trial judge will admit into evidence those confessions that are found, *by a preponderance of the evidence*, to have been made voluntarity. *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619 (1972); *Butler v. Rundle*, 429 Pa. 141, 239 A.2d 426 (1986); *Commonwealth v. Yocham*, 483 Pa. 478, 397 A.2d 766 (1979); *Commonwealth v. Schroth*, 495 Pa. 561, 435 A.2d 148 (1981).

Recently, the United States Supreme Court in *Nix v. Williams*, ____U.S. ____, 104 S.Ct. 2501 (1984) affirmed the preponderance of the evidence standard of proof in the application of the ultimate or inevitable discovery exception to the exclusionary rule. The Court in discussing the justification for the exception said:

> It is clear that the cases implementing the Exclusionary Rule "begin with the premise that the challenged evidence is *in some sense* the product of illegal governmental activity." *United States v. Crews*, 445 U.S. 463, 471, 100 S.Ct. 1244, 1250, 63 L.Ed.2d 537 (1980) (emphasis added). Of course, this does not end the inquiry. *If the prosecution can establish by a preponderance of the evidence* that the information ultimately or inevitably would have been discoverd by lawful means then the deterrence rationale has so little basis that the evidence should be received. (Emphasis added).

Id. at ____, 104 S.Ct. at 2509.

The preponderance of evidence standard serves society well in the context of suppression hearings and in those cases where a court is required to consider the inevitable discovery exception to the exclusionary rule.

> "Evidence obtained in violation of the Fourth Amendment has been excluded from federal [and state] criminal trials for many years. (Citation omitted). The same is true of coerced confessions offered in either federal or state trials. (Citations omitted). But from our experience over the period of time no substantial evidence has accumulated that federal rights have suffered from determining admissiblity *by a preponderance of the evidence*. Petitioner offered nothing to suggest that admissibility rulings have been unreliable or otherwise wanting in quality because not based on some higher standard." (Emphasis added).

Lego v. Twomey, supra at 488.

Our courts have consistently held that in parole and probation revocation proceedings the Commonwealth's burden is to prove a violation by a *preponderance of the evidence*. *Commonwealth v. Brown*, 503 Pa. 514, 520, N.2, 469 A.2d 1371, 1373, N.2 (1983); *Commonwealth v. Gochenaur*, ____Pa. Super ____, 480 A.2d 307 (1984); *Commonwealth v. DelConte*, 277 Pa.Super 296, 419 A.2d 780 (1980). As in a sentencing hearing under Section 9712, implicit in a revocation hearing is the competing interests of the criminal defendant and the Commonwealth. In a revocation proceeding "the liberty of [alleged violater], although indeterminate, includes many of the core values of unqualified liberty and, its termination inflicts a 'grievous loss' on the [alleged violater] and often on others." *Morrisey v. Brewer*, 92 S.Ct. 2593 at 2601. The Commonwealth has a legitimate contending interest "in being able to return [a violater] to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole." *Id.* This lighter burden of proof is consistent with the focus of a revocation hearing which seeks to determine whether parole or probation, in the individual case, is "an effective vehicle to accomplish rehabilitation and a sufficient deterrant against future antisocial conduct." *Commonwealth v. Kates*, 452 Pa. 102. *See also Commonwealth v. Gochenaur, ____Pa.Super at ____*, 480 A.2d at ____.

This same standard of proof has been held to be the proper one in determining whether a convicted defendant is to be considered dangerous and given an enhanced sentence under a federal statute relating to dangerous special offenders. (18 U.S.C.A. §3575(b)). *See United States v. Schell*, 692 F.2d 672 (10th Cir. 1982).

A heightened standard of proof to establish visible possession of a firearm as a sentencing factor was not deemed desirable by the legislature and is not constitutionally required. The lesser burden of proof specified by the act is in harmony with the focus of a sentencing hearing under Section 9712 which is to decide the one discreet fact of whether the defendant was in visible possession of a firearm when he committed the crime for which he was convicted. Proof by a preponderance of the

evidence as prescribed by Section 9712(b) satisfies due process.

This Concurring Opinion is joined in by the Majority Opinion.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	DECEMBER SESSIONS, 1982
	:	No. 2543, PIC - GENERALLY
	:	PIC - CONC. WEAPON
	:	No. 2544, SIMPLE ASSAULT
	:	AG ASSAULT
V.	:	No. 2545, REAP
	:	No. 2546, CAR F/A ON PUB.
	:	STREETS OR PUB. PTY.
	:	UNLFL. CAR F/A
	:	W/O LIC.
DYNEL McMILLAN	:	CAR F/A W/O LIC.
	:	IN VEHICLE

OPINION

GOLDMAN, *J.* FILED: February 2, 1984

The defendant, Dynel McMillan, was found guilty of aggravated assault and possessing an instrument of the crime. 42 PA. CONS. STAT. ANN. §9712(a) (Purdon 1983), Sentences for Offenses Committed with Firearms, provides that "[a]ny person who is convicted in any court of this Commonwealth of . . . aggravated assault as defined in 18 Pa. C.S. §2702(a)(1) . . . shall, if the person visibly possessed a firearm during the commission of the offense, be sentenced to a minimum of at least five years of total confinement. . . ." *Id.* Further, §9712(b) states: ". . . The applicability of this section shall be determined at sentencing. *The court shall determine by a preponderance of the evidence, if this section is applicable." Id.* (emphasis added).

The defendant objects to the imposition of the Mandatory Minimum Sentencing Act ("Act"). He contends, inter alia, that his procedural due process is denied by the preponderance of the evidence standard of proof employed in the Act. We agree and we hold that the proper

standard of proof for the Act should be beyond a reasonable doubt, and that its absence renders the Act unconstitutional. Because of this view, we find it unnecessary to address the defendant's other objections.

Several decisions from the Philadelphia Court of Common Pleas, which are presently on appeal to the Supreme Court of Pennsylvania, have already deemed the Act unconstitutional. Our opinion is closely in accord with the reasoning of Judge Kalish in *Commonwealth v. Allen* (Nos. 040-42, March Term, 1983), C.C.P. Philadelphia County, Opinion filed November 18, 1983) and *Commonwealth v. Burton* (Nos. 230-33, July Term, 1983, C.C.P. Philadelphia County, Opinion filed December 16, 1983).

BY THE COURT:

Goldman, *J.*

COMMONWEALTH OF PENNSYLVANIA	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY TRIAL DIVISION
VS.	:	
	:	AUGUST TERM, 1982
HAROLD SMALLS	:	NOS. 1631-1636
D'ALESSANDRO, J.	:	FEBRUARY 29, 1984

OPINION

On March 18, 1983, after a jury-waiver trial before this court, the defendant was convicted of robbery of the first degree,[1] criminal conspiracy,[2] theft by unlawful taking or disposition,[3] theft by receiving stolen property,[4] recklessly endangering another person,[5] carrying a firearm on a public street or public property,[6] and carrying firearms without a license.[7]

The defendant filed written post verdict motions and also filed a motion to prevent the imposition of the Mandatory Sentencing Act. The Commonwealth had given notice that it would proceed under the Act at the time of sentencing. After oral argument before the court the defendant's post verdict motions were denied and the court ordered briefs prepared on the issue of the Mandatory Sentencing Act's application. Subsequent to briefs having been prepared and filed the court heard oral argument on this issue.

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1. 18 Pa. C.S.A. §3701(a)(1)(ii)
2. *Id.* §903
3. *Id.* §3921
4. *Id.* §3925
5. *Id.* §2705
6. *Id.* §6108
7. *Id.* §6106

DISCUSSION

In the present case the Commonwealth has sought to impose what has come to commonly be referred to as the "firearms section" of the Mandatory Act, 42 Pa. C.S.A. §9712. This section, in its entirety, provides as follows:

> §9712. *Sentences for offenses committed with firearms*
>
> (a) Mandatory sentence. — Any person who is convicted in any court of this Commonwealth of murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery as defined in 18 Pa. C.S. §3701(a)(1)(i), (ii) or (iii) (relating to robbery), aggravated assault as defined in 18 Pa. C.S. §2702(a)(1) (relating to aggravated assault) or kidnapping, or who is convicted of attempt to commit any of these crimes, shall, if the person visibly possessed a firearm during the commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary.
>
> (b) Proof at sentencing. — Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

> (c) Authority of court in sentencing. — There shall be no authority in any court to impose on an offender to which this section is applicable any lesser sentence than provided for in subsection (a) or to place such offender on probation or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a sentence greater than that provided in this section. Sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory sentences provided in this section.
>
> (d) Appeal by Commonwealth. — If a sentencing court refuses to apply this section where applicable, the Commonwealth shall have the right to appellate review of the action of the sentencing court. The appellate court shall vacate the sentence and remand the case to the sentencing court for imposition of a sentence in accordance with this section if it finds that the sentence was imposed in violation of this section.
>
> (e) Definition of firearm. — As used in this section "firearm" means any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive or the expansion of gas therein.

The court finds that this statute, as written, is constitutionally defective in its provision that the sentencing judge must, at the time of sentencing, make a determination by a preponderance of the evidence as to whether the defendant visibly possessed a firearm during the course of committing one of the enumerated offenses.

The role of a sentencing judge involves the evaluation of facts that characterize a defendant so that a meaningful sentence can be fashioned for the particular individual. Unlike facts which characterize a defendant, facts relating to acts that constitute a crime for which a

defendant may be punished are for the trier of fact to determine at trial. The visible possession of a firearm is clearly a factual finding that relates to a criminal act for which the defendant faces a minimum five (5) year period of incarceration under the statute.

Both the Supreme Court and Superior Court of this Commonwealth have interpreted what is meant by the term "crime." In *Commonwealth v. Smith*, 266 Pa. 511, 109 A.786 (1920) the Supreme Court defined a crime to be "an act committed or omitted in violation of a public law either forbidding or commanding it." *Id.* at 516, 109 A. at 788. The Superior Court has variously defined a crime as "a wrong directly or indirectly affecting the public, to which the state has annexed certain punishments and penalties, and which it prosecutes in its own name in what is called a criminal proceeding," *Commonwealth v. Shimpeno*, 160 Pa. Super. 104, 114, 50 A.2d 39, 44 (1946) (citing Corpus Juris Secundum), and as "an act forbidden by law under pain of punishment," *Commonwealth v. Dillworth*, 204 Pa. Super. 420, 426, 205 A.2d 111, 113 (1964) (citing Stephen, Criminal Law). In the present case §9712, while not expressly using the words "wrong" or "forbidden," establishes first degree robbery while visibly possessing a firearm as proscribed conduct to which a specific punishment attaches. The mandatory punishment is ipso facto a testament to the wrongfulness of the acts described.

That the visible possession of a firearm is an element of a crime is supported by statutory definition of that concept found in the Crimes Code. 18 Pa. C.S.A. §103 defines the term "element of an offense" as:

> Such conduct or such attendant circumstances or such a result of conduct as:
>
> (1) is included in the description of the forbidden conduct in the definition of the offense;
>
> (2) establishes the required kind of culpability;

> (3) negatives an excuse or justification for such conduct;
>
> (4) negatives a defense under the statute of limitation; or
>
> (5) establishes jurisdiction or venue.

The visible possession of a firearm is the factor of conduct which is necessary to establish the "required kind of culpability" referred to in subclause (2) above for the crime to be complete under §9712. By the terms of §103 the visible possession of a firearm is an element of a crime notwithstanding the legislature's attempt in §9712(b) to declare that it is not: "Provisions of this section shall not be an element of the crime. . . ."

In addition to the Crimes Code definition of an element of an offense this court looks to the test set forth by the Superior Court in *Commonwealth v. Stoffan*, 228 Pa. Super. 127, 323 A.2d 318 (1974):

> The problem of deciding whether a particular clause states a fact that constitutes a necessary element of the crime is a problem of statutory construction. The answer depends on what behavior the General Assembly intended to prohibit. Any language referring to such behavior states a necessary element of the crime.

Id. at 139, 323 A.2d at 324 (footnote omitted). The obvious purpose of §9712 is to punish persons who commit certain acts with a firearm and to deter those who would contemplate such criminal behavior. The legislature sought fit to establish proof of such conduct by looking at whether or not a person visibly possessed a firearm as part of the crime. "Visibly possessed a firearm" is inarguably language which refers to behavior which the legislature intended to prohibit and thus satisfies the *Stofan* interpretation of an element of a crime.

Because the defendant in the present case was in effect charged with the crime of first degree robbery while visibly possessing a firearm he was entitled through Article I §9 of the Constitution of the Commonwealth of Pennsylvania to a jury trial thereon. By removing the determination of whether or not the defendant visibly possessed a firearm from the finder of fact and making it a function of the sentencing judge the legislature has denied the defendant this constitutional right. The statute's infringement of this important constitutional protection is not remedied in the present case by the fact that the defendant elected not to be tried by a jury. The crux of the constitutional violation lies in the fact that at the time the defendant was given a choice between a jury or bench trial the choice of a jury would have afforded him no protection on the issue of the visible possession of a firearm. Such a result violates the most basic tenet of the constitutional right to trial by jury which is that such right extends to the proof of each and every element of the crimes charged.

The court considers the legislature's removal of a crucial determination of fact, which if proven by the Commonwealth results in a mandatory sentence, from the province of the finder of fact as an attempt to eliminate a constitutional protection by denying the status of an element of a crime. The constitutional right to a trial by jury cannot be subverted by simply refusing to recognize fundamental concepts of criminal law.

In addition to abrogating the function of the finder of fact at trial §9712 provides that the sentencing judge shall determine whether the visible possession of a firearm has been established by a preponderance of the evidence. As a consequence of this court's finding that the visible possession of a firearm is an element of a crime to be determined at trial by the finder of fact it must follow that the appropriate standard of proof be that which is accorded to any other element of a crime: proof beyond a reasonable doubt. The United States Supreme Court,

in *In re Winship*, 397 U.S. 358 (1970), has imposed on the states, through the 14th Amendment, the requirement that every fact essential to a crime be proven beyond a reasonable doubt. The standard of proof provided by §9712 is, therefore, inadequate to the status of the visible possession of a firearm element and as such denies the defendant due process of law.

For the above reasons, the defendant's motion to prevent the imposition of the mandatory sentence set forth in 42 Pa. C.S.A. §9712 is GRANTED.

BY THE COURT:

_____

Comm v. Lorna Peterson
In Court Opinion
of Judge Savitt

This is the opinion of the Court. So what you do is type this separately and before anything else so I have it.

It is the opinion of the Court, in the early morning of September 2, 1982, the defendant shot and killed her husband in the bedroom of their house at 8436 Fayette Street. The defendant and the deceased had quarreled for several hours prior to the shooting. The defendant testified at trial that the deceased threatened her with the murder weapon, a revolver, before she shot him.

On November 16, 1983, at the conclusion of a bench trial, the defendant was found guilty of voluntary manslaughter and possessing a criminal instrument generally. Timely motions for a new trial and in arrest of judgment have been filed. Additionally, the defendant has filed motion to bar application of the Mandatory Sentencing Act. In support of her motion for a new trial and in arrest of judgment, the defendant argues that the verdict was against the law, against the evidence, against the weight of the evidence. A careful review of the trial

record in the light most favorable to the Commonwealth reveals that there is sufficient evidence to prove beyond a reasonable doubt that the defendant is guilty of voluntary manslaughter and possessing a criminal instrument. Accordingly, the defendant's motion in arrest of judgment should be denied.

The record in the instant case discloses that the defendant's conviction is sustained by the weight of the evidence or at the very least, that the verdict is not so contrary to the evidence as to shock one's sense of justice. See Commonwealth v. Miller, 450 A.2d 40, Pa. Superior Ct. 1982. Therefore, the defendant's request for a new trial based upon the weight of the evidence is without merit.

In the instant case, the verdict was clearly an alternative left to the Court after the presentation of the evidence. Accordingly, the verdict was not contrary to law.

The defendant also avers that the Commonwealth failed to prove beyond a reasonable doubt:

> 1. That the defendant was not acting in self-defense, and
>
> 2. That she did not believe that she was in imminent danger of death or great bodily harm, and that it was necessary to kill in order to protect herself.

As stated above, there was sufficient evidence presented at trial to prove beyond a reasonable doubt that the defendant was guilty of voluntary manslaughter. The record indicates that the defendant was not reasonable in her belief that the shooting of the deceased was then and there necessary to protect herself from imminent death or bodily injury. The deceased was unarmed and sitting with his back to the defendant at the time of the shooting. Although the deceased had threatened and provoked the defendant sometime prior to the shooting, his quarrel with her had subsided. The defendant made no

attempt to leave the presence of the deceased or to otherwise rebuff his threats before using deadly force. Accordingly, this allegation of error is without merit.

The defendant further contends that it was error to permit the assistant medical examiner to testify concerning his opinion regarding the time of the death of the decedent.

At the trial, Dr. Robert Siegle testified in response to a hypothetical question asked by the Assistant District Attorney that he had an opinion as to the decedent's time of death and testified further concerning his opinion in that regard.

The notes of testimony of November 15, 1984, pages 89 and 90. The doctor testified over a defense objection.

Expert testimony is admissible when it involves explanations and inferences not within the range of ordinary training, knowledge and experience. The question of whether the witness is qualified to give expert testimony rests in the sound discretion of the Court. Commonwealth v. Bennett, 370 A.2d 373, 1977.

In this case, it was stipulated that Dr. Siegle is a qualified expert in forensic pathology. As such, he was qualified to testify regarding the time of the decedent's death. The hypothetical question put to him in this regard was based on evidence in the record of the case. Accordingly, it was not error, as the defendant alleges, to permit Dr. Siegle to state his opinion even though that opinion may not have been based on first-hand knowledge. See Commonwealth v. Daniels, 390 A.2d 1972, 1978.

For the reasons herein stated, the defendant's motion for a new trial and in arrest of judgment is denied.

. . . .

that. Skip a few spaces and start right into here and have that done separately in case there is an appeal. There will be no impediment to either side finding or seeing that opinion if either side wants to appeal.

In a separate lengthy motion, the defendant challenges the application of the Mandatory Sentencing Statute to this case and avers the following:

1. That the notice of the Commonwealth's intention to proceed under the statute is inadequate.

2. The statute is unconstitutional.

3. The statute does not call for a mandatory minimum sentence but a mandatory sentence of five years' duration.

4. The Commonwealth failed to prove a firearm was visible during the commission of the offense.

To impose a five-year minimum sentence for the commission of a crime under the circumstances defined by the statute violates due process since the statute requires proof of those circumstances merely by a preponderance of the evidence at sentencing rather than beyond a reasonable doubt at trial. The circumstances invoking the mandate of the statute are in the nature of an element of a crime and should be determined by the trier of fact beyond a reasonable doubt at the time of trial.

For an analysis of the above issues, see Commonwealth v. Allan, 10 Philadelphia County Reporter 109, 1984; Commonwealth v. Burton, August 1983, No. 230, C.P. Philadelphia, December 16, 1983; Commonwealth v. Smalls, August 1982, No. 1631 through 1636.

The fact that in the instant case the defendant was also convicted of possessing instruments of a crime is not controlling. Although in the instant case the Court did find beyond a reasonable doubt that the defendant possessed a firearm, this cannot validate an otherwise constitutionally infirm statute.

For the reasons set forth, the Court does not feel obligated to follow the mandatory sentence as set forth in the statute in question.

All right, now with that, I am prepared to hear any evidence you would like to present concerning sentence if both sides are prepared to proceed on that subject at this time.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	August Session, 1983
v.	:	Nos. 1306, 1308, 1309 and November Session, 1983
JAMES DENNISON	:	Nos. 2352, 2353, 2355

Before: Diaz, Braxton, Avellino, JJ.

OPINION

AVELLINO, *J.*

Defendant objects to being sentenced under the Mandatory Sentencing Act (the "Act") relating to certain offenses committed with firearms, 42 Pa.C.S.A. §9712[1], and attacks the Act on the ground that it constitutes an impermissible delegation of Legislative power to the Executive in violation of Article II, Section 1 of the Pennsylvania Constitution.

We agree.

Factual Background

On July 28, 1983, James Dennison ("Dennison") awoke and discovered that Three Hundred Dollars ($300.00) had been taken from his wallet. Dennison persuaded himself that the money had been stolen by Ted Zinni ("Zinni"), a young man recently befriended by

1. 1974, Dec. 30, P.L. 1052, No. 345, § 1. As Amended 1980, Oct. 5, P.L. 693, No. 142, § 401(a); 1982, March 8, P.L. 169, No. 54 § 2. Defendant's objection raised an issue that has provoked considerable controversy in both legal and public forums. Accordingly, it was heard by the Court *en banc*. The Defender Association of Philadelphia was granted leave and did participate as *amicus curiae*.

Dennison and with whom Dennison had spent the prior evening drinking beer.

Dennison took his duly registered .38 caliber Smith & Wesson revolver and went looking for Zinni. He found Zinni at a neighborhood schoolyard, and after a brief on-the-street confrontation, Zinni ran. Dennison fired at least two shots, one of which found its mark. Zinni has recovered from his injuries but continues to suffer from a partial paralysis of the last two fingers on his left hand.

Dennison is a 73 year old Army Veteran, who lost a leg while serving on active duty in Nicaragua between 1928 and 1931. Subsequently, he worked for 30 years as a tool and die maker for the Philco Company. His 43 year marriage ended with his wife's death in 1981. He has not been convicted of any crime since 1937. He has had two heart attacks since being incarcerated in lieu of bail, and is now confined in the hospital wing of the county prison.

At trial, Dennison admitted to shooting Zinni. Following Dennison's felony conviction for aggravated assault, the District Attorney, on the record, gave notice to Dennison of the Commonwealth's intention to seek a five year sentence in accordance with the Act.

The Contentions of the Parties

Dennison urges that the Act is fatally flawed and cannot pass constitutional muster. The thrust of his argument is that the *Act is not self-executing*. If it were, it would apply to every defendant situated as he is today, dictating that no one could escape mandatory minimum imprisonment of at least five years. That, he admits, would be fair. Instead, this Act simply gives the District Attorney the option to invoke its sanction whenever he sees fit to do so. That, Dennison argues, calls for an exercise of discretion; but, he maintains, the legislature has failed to provide the District Attorney, or the Court, with any criteria or yardstick against which the exercise of such discretion might be measured. Dennison refers

us to *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1945), *State v. Cory*, 204 Or. 235, 282 P.2d 1054 (1955), and *State v. Olson*, 325 N.W. 2d 13 (Minn. 1982).

The District Attorney, on the other hand, tells us he is under no duty to explain why he has chosen to invoke the Act against Dennison. He views that decision as a matter or prosecutorial discretion not unlike that which he exercises daily when deciding whether, when and which criminal charges to bring. The prosecutor relies almost exclusively upon *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed. 755 (1979).

The issue thus having been joined was then presented to the Court *en banc*.

Discussion

We start with the mandate that the power to determine what constitutes a crime and what punishment shall be meted out belongs to the Legislature. *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed. 2d 535 (1983); *Commonwealth v. Stone*, 229 Pa. Super. 24, 323 A.2d 184 (1974). We recognize, too, that the mere fact that the Pennsylvania Legislature has traditionally delegated to the Judiciary wide discretion in the matter of punishment does not confer upon the Judiciary a vested or inherent right to the continued enjoyment of that authority. *Commonwealth v. Brant*, 239 Pa. Super. 43, 361 A.2d 350 (1976).

Indeed, Dennison does not challenge the power of the Legislature to limit, as it sees fit, the discretion of the Judiciary in sentencing matters. He readily concedes the power of the Legislature to set mandatory minimum sentences for some or all classes of crimes.

Instead, he argues that the Legislature may not delegate *its* power to impose punishment to the public prosecutor. Alternatively, if such power be delegated, it must be accompanied by clearly discernible criteria defining

the circumstances under which it may be exercised. For the Legislature to do otherwise would be a *surrender* of its power as opposed to an exercise thereof.

The threshold question, then is whether the Act is self-executing or requires a discretionary act by the prosecutor to trigger its application.

The Statute provides in pertinent part:

§ 9712. SENTENCES FOR OFFENSES COMMITTED WITH FIREARMS

(a) *Mandatory sentence.* —

Any person who is convicted in any court of this Commonwealth of . . . aggravated assault as defined in 18 Pa. C.S. §2702(a)(1) (relating to aggravated assault) . . ., or who is convicted of attempt to commit any of these crimes, shall, if the person visibly possessed a firearm during the commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary.

(b) *Proof at sentencing.* —

Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required *prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing.*

The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

The italicized portion of subsection (b) was inserted on December 8, 1981, just before the third and final consideration of the Bill by the Senate. Until that moment there was a period after the word "required." The Amendment was offered by Senator Gekas by unanimous consent without any recorded debate. Identical amendments were made at the same time to three other mandatory sentencing bills.[2] On December 16, 1981, following the required reprinting, the bill, as amended, was called up and passed without any debate recorded. It was thereafter sent to the House of Representatives where final passage occurred on February 23, 1982, again without any recorded debate.

With these amendments a "notice" requirement was created where none had previously existed in four mandatory sentencing bills. The recorded Legislative history of these Acts provides no clue nor explanation for the Senate's action. Indeed, the only mention of the Legislation in the Senate's *Journal* was a brief speech by Senator O'Pake on September 22, 1981. His remarks focused almost exclusively on the problems of prison overcrowding and the urgent need to provide for expansion and renovation of county jails especially in light of the Governor's recent endorsement of mandatory jail sentencing legislation.

It is interesting to note that on November 30, 1982, both houses enacted additional mandatory sentencing acts: 42 Pa.C.S.A. § 9717 (Sentences for Offenses Against Elderly Persons), and 42 Pa.C.S.A. § 9718 (Sentences for Offenses Against Infant Persons). Neither of these Acts contains a "notice" requirement; each is entirely self-executing.

The prosecutor in the instant case does not seriously dispute the notice requirement imposed upon him. He

2. See 42 Pa.C.S.A. §9713(c) (Sentences for Offenses Committed on Public Transportation), 42 Pa.C.S.A. § 9714(c) (Sentences for Second and Subsequent Offenses) and 42 Pa.C.S.A. §9715(b) (Life Imprisonment for Homicide).

suggests, without enthusiasm, that we could liken his role under the statute to that of an interested person who is merely "identifying" appropriate cases for the Court's attention at a post-conviction hearing. To adopt that suggestion, however, would require us to ignore the plain meaning of the statutory language.

That reasonable notice of the Commonwealth's intention to proceed under the Act *shall* be provided means it *must* be provided. Otherwise, the Act will not apply. The prosecutor concedes this in his brief, and, indeed, has been criticized for his selective use of the notice requirement. Our colleague, Judge D'Alessandro, in an opinion[3] dated February 3, 1984, has listed several cases where the prosecutor chose not to invoke the Act despite the fact that it seemed plainly applicable. We could easily supplement his list with cases culled from our own recent experience.

It is clear to us that the Act under scrutiny is not self-executing. Its application arises as a matter of choice by the prosecutor, such discretion manifested by either giving or withholding the required notice.

Moreover, once the dreaded notice has been given, the consequences for a defendant like Dennison are most profound. His sentencing hearing has little or no meaning. First, since Dennison admitted shooting Zinni, it is a virtual certainty that the Sentencing Judge will be persuaded by a "preponderance of the evidence" that he visibly possessed a firearm. That aside, the only remaining matter is for the Sentencing Judge to decide whether to impose a period of confinement in *excess* of five years. And given the legislative criteria[4] that judges are obliged to consider when imposing sentence, there is no risk of that occurring in a case like his. Thus, Dennison, at age 73, is faced with the prospect of spending the rest of his

3. *Commonwealth v. Simms*, October Term, 1982, Nos. 1711-1717.

4. 42 Pa.C.S.A. § 9721

natural life incarcerated not because the Mandatory Sentencing Act rests quietly among the pages of a book of statutes, but rather because the District Attorney has chosen to lift that book and throw it, not too gently, in Dennison's direction.

Finding that the Act is *not* self-executing, we turn to the question whether the Legislature can, without violating Article II, Section 1 of the Pennsylvania Constitution, delegate such power to the public prosecutor.

We begin with the axiom that all governmental power belongs to the people. Our Constitution, like that in the federal system, separates this power among the Executive, Legislative and Judicial branches. As Judge Williams recently noted:

> The principle of separation of powers is the cornerstone of our democratic form of Government. From the historical perspective presented by Hamilton, Jay and Madison to the present time, it has been, and remains a vital doctrine determining the structure of both our state and federal systems, and is the statement of the parameters within which each of the branches of Government operates. *Heller v. Frankston*, 464 A.2d 581, 585 (Pa. Commw. Ct., 1983).

Article II, Section 1 of the Pennsylvania Constitution reposes the legislative power in the General Assembly. The General Assembly cannot, in turn, delegate to another its power to make a law or impose a sanction. *Belovsky v. Redevelopment Authority*, 357 Pa. 329, 342, 54 A.2d 277, 284 (1947).

In discussing the Constitutional prohibition against delegation of legislative power, sometimes called the non-delegation principle, Justice Roberts instructed that the prohibition serves two interrelated purposes. First, it seeks to insure that *basic policy choices* will be made by duly authorized and politically responsible officials. Second, it seeks to protect against the arbitrary exercise of

unnecessary and uncontrolled discretionary power. *William Penn Parking Garages, Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975).

When the Act in question is viewed in this light, its constitutional infirmity becomes manifest. "Basic policy choices" have not been made by the Assembly. Instead, these choices have been delegated, without any criteria, to public prosecutors throughout the Commonwealth.

If the Act were self-executing, applicable to all, it could be argued that the basic policy choices had been made.[5] We could then agree with our respected colleague, Judge Stively, that the Act "is an effort by the Legislature to not only punish perpetrators of violent crimes but to create a deterrent effect through the eventually widespread knowledge that one who is convicted of using or possessing a firearm while committing any one of a number of crimes cannot, and will not, escape a mandatory minimum imprisonment of at least five years."[6]

But, we can find nothing in the Act, nor in the scant legislative debate that preceded its passage, that remotely suggests the answer to any of the following[7] *basic policy* choices regarding its enforcement.

> (1) Should it be invoked against a defendant who has no significant history of prior criminal convictions?

---

5. As noted at page 8, *supra*, recent mandatory minimum sentencing legislation for crimes committed against elderly and infant persons contains no privision requiring a discretionary act on the part of the public prosecutor. See 42 Pa.C.S.A. §§9717 and 9718, effective March, 1983.

6. *Commonwealth v. Wright*, Chester Co., No. 144482, opinion dated May 20, 1983.

7. *Cf.* 42 Pa.C.S.A. §9711 (Sentences for Murder of the First Degree). These choices are illustrative and not meant to be exhaustive.

(2) Should it be invoked against a defendant who was under the influence of extreme mental or emotional disturbance?

(3) Should it be invoked against a defendant regardless of his age or physical condition?

(4) Should it be invoked when the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired?

(5) Should it be invoked when the victim's own conduct precipitated the criminal act though not under circumstances giving rise to a defense of justification?

Instead of making these difficult choices, the Legislature, in our view, has abdicated its responsibility. Invoking the Act has been left to the unreviewable discretion of the prosecutor. All that is certain is that "reasonable notice" must be given at some point between conviction and sentencing. No one can state with the requisite degree of certainty what, if any, criteria are to apply to formulate the decision to give the required notice.

A situation similar to our own confronted the Supreme Court of Oregon in 1955, when it was obliged to review that State's Habitual Offender Statute that had been self-executing until 1951. In that year the statute was amended to create two classes of offenders, those who had been previously convicted of a crime involving violence and those with prior convictions for so-called non-violent offenses. For the former the Act remained self-executing, but for the latter the statute provided that the district attorney "*may*, . . . file an information . . . ." That was sufficient provocation for the Court, which bristled at the "unbridled discretion" given the prosecutor, and opined:

> In the portion of the statute being considered, there is no yardstick or semblance of classification which would enable the *district attorney* to determine under what circumstances an information should be filed. . . . In other words, the fate of persons, even to the extent of life imprisonment, who have committed the same acts [prior non-violent offenses] under the same circumstances and in like situations is determined by the whim and caprice of the district attorney. We hold the portion of [the Act] reading 'and in other cases, may' unconstitutional. *State of Oregon v. Cory*, 204 Or. 235, 240, 282 P.2d 1054, 1056 (1955).

All that remains is for us to deal with the prosecutor's almost total and misplaced reliance upon *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed. 755 (1979).

In *Batchelder*, the same criminal conduct fell within the purview of *two* separate, self-executing but overlapping, federal statutes. Neither statute carried a mandatory sentence. One provided, upon conviction, for a maximum term of not more than two years, the other for not more than five years. Each crime "unambiguously specified the penalties available to enforce its substantive proscriptions." The defendant's argument that the prosecutor was fixing the penalty by proceeding on one of the statutes as opposed to the other was dismissed by the Court, with Justice Marshall noting that the prosecutor's decision *did not* empower the Government to predetermine ultimate sanctions. Rather, it merely enabled the Sentencing Judge to impose a longer sentence if he saw fit to do so.

From this decision the prosecutor has fashioned two arguments which shall be dealt with *seriatim*.

First, that the choice to give or withhold the required notice under the Act is a matter of prosecutorial discretion, the limits on which have been well established by

case law developed under the Fourteenth Amendment to the United States Constitution.

This argument misses the point. We have satisfied ourselves, following a review of the Act and its legislative history, that the General Assembly failed to make any basic policy choices regarding its enforcement, delegating that function instead to prosecutors throughout Pennsylvania. That failure voids the Act under the non-delegation principle vouchsafed by Article II, Section 1 of the Pennsylvania Constitution. The Act cannot be revived by a doctrine that merely grants a prosecutor considerable latitude in his charging function. Such a doctrine presupposes the very existence of charges; that is, that the General Assembly has validly exercised its power. The doctrine is not available as a substitute for the failure of the General Assembly to make the difficult policy choices that the Constitution insists that it, and it alone, must make. In brief, the power to make those basic policy choices cannot be delegated to another under our constitutional system of government. From a constitutional perspective, it matters not who the "other" may be. Indeed, an attempt by an adoring Congress to delegate its power to President Roosevelt was struck down by the United States Supreme Court in the landmark case of *Panama Refining Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1945). The President of the United States, like our own public prosecutor, acts under color of law and within Constitutional restraints.

The prosecutor next suggests that the Act creates a new crime of "aggravated assault by firearm," and in choosing between it and the more familiar or "old" aggravated assault statute, he is merely exercising discretion of the sort validated in the *Batchelder* case.

We respond initially by noting that the prosecutor comes late to this argument. When our learned colleague, Judge Kalish, first examined the Mandatory Sentencing Act as set forth in §9714, the Commonwealth asserted that the Act did *not* create a group of new

crimes. Judge Kalish rejected that contention. In his view, the Act, *de facto*, created new crimes, such as "robbery committed by recidivist." Having made that decision, Judge Kalish then proceeded to void the Act since proof of the new element, viz, "recidivism," was not required beyond a reaonable doubt as mandated by the due process clause of the Constitution. In Judge Kalish's view, "the Legislature cannot so lightly deprive a person of constitutional right by making recidivism a part of the sentence scheme."[8]

Although not necessary to our decision, we do accept Judge Kalish's analysis of §9714 of the Mandatory Sentencing Act as being equally applicable to §9712. In our view, "visible possession of a firearm" is an element of the crime described by that section. In brief, if we adopted the prosecutor's assertion that the Legislature created a second crime of aggravated assault (by firearm), we would be obliged to void that legislation for failing to measure up to the standard of proof required by due process of law.

Finally, while we admire the prosecutor's nimble advocacy and applaud his adoption of Judge Kalish's analysis, albeit temporary, we, nevertheless, reject his proferred analogy for yet another reason. It is further flawed by the fact that, unlike the *Batchelder* case, the punishment here for the alleged new crime is not self-executing. Its sanction is invoked, if at all, by the prosecutor's own post conviction choice. He fails to recognize that this is a basic policy decision, a legislative choice, that is not his to make. Having usurped that legislative choice and thrust the Act into being, his analogy requires him to next make a prosecutorial choice between it and the less onerous sanction for felony assault.

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8. *Commonwealth v. Allen*, March Term, 1983, Nos. 40-42, opinion dated November 18, 1983. See also, *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975).

That's one too many hats for him to be wearing. *Cf. Dussia v. Barger*, 466 Pa. 152, 351 A.2d 667 (1975).

We believe that our Constitution requires that this first choice must be made by 253 legislators, each having the benefit of public debate, each other's counsel, and the responsibility of facing the electorate in even numbered years.

Conclusion

Accordingly, we sustain Dennison's objection to the Commonwealth application for sentencing him under the Act, finding that Act to constitute an impermissible delegation of legislative power to the Executive in violation of Article II, Section 1 of the Pennsylvania Constitution.[9]

BY THE COURT:

DIAZ, J.

BRAXTON, J.

AVELLINO, J.

Dated: May 1, 1984

9. As a consequence of this determination, we have not reached Dennison's alternative assertion that the Act as applied to him constituted cruel and unusual punishment.

Exhibit "E"

ASSAULT, ROBBERY, AND BURGLARY STATUTES IN OTHER JURISDICTIONS WITH POSSESSION OF FIREARM OR OTHER WEAPON DURING COMMISSION OF THE OFFENSE AS AN ELEMENT OF THE DEFINITION OF THE OFFENSE

Alabama Code of 1975, §13 A-6-20(a)(1), §13 A-6-21(a)(2), §13 A-6-22(a)(3), §13 A-7-5(a)(1), §13 A-7-6(a)(1), §13 A-8-41(a)(1).

Alaska Statutes, §11.41.200(a)(1), §11.41.210(a)(1), §11.41.220(a)(1), §11.41.230(a)(2), §11.41.500(a)(1), §11.46.300.

Arizona Revised Statutes Annotated, §13-1204(A)(2), §13-1508(A), §13-1904(A), §13-1206.

Arkansas Statutes, §41-1601(1)(a) (1977), §41-1602(1)(b) (Supp. 1983), §41-1603(1)(c) (1977), §41-2102 (Supp. 1983).

Annotated California Codes — Penal Code, §245(a)(2) (Supp. 1984), §245(c).

Colorado Revised Statutes, §18-4-202(1), §18-4-302(1)(a), (b).

Genl. Statutes of Connecticut, §53a-55a, §53a-59(a)(1), §53a-70a, §53a-94a, §53a-101(a)(1), §53a-134(a)(2), §53a-56a, §53a-60c, §53a-60a.

Delaware Code Annotated, §612, §613, §826, §832.

District of Columbia Code, §22-502, §22-505.

Florida Statutes Annotated, §784.021(1)(a), §784.045(1)(b), §810.02(2)(b) (Supp. 1984), §812.13(2)(a).

Code of Georgia Annotated, §26-1302, §26-1902, §26-9908a.

Hawaii Revised Statutes, §707-711(1)(a), (b) (Supp. 1983), §708-810(1)(a), §708-840(1)(b) (Supp. 1983).

Idaho Code, §18-905(a) (Supp. 1984), §18-907(b) (Supp. 1984).

Illinois Statutes Annotated, §12-2(a)(1), §12-4(b)(1) (Supp. 1984-85), §18-2 (Supp. 1984-85).

Indiana Code Annotated, §35-42-2-1(3) (Supp. 1984), §35-42-5-1 (Supp. 1984), §35-43-2-1 (Supp. 1984).

Iowa Code Annotated, §708.1(3), §711.2, §713.3 (Supp. 1984-85), §713.4.

Kansas Criminal Code Annotated, §21-3410(a), §21-3414(c), §21-3427.

Kentucky Revised Statutes, §508.010(a), §508.020(b)(c), §511.020(a), §515.020(b).

Louisiana Revised Statutes Annotated, §14.34 (Supp. 1984), §14.37, §14-60(1), §14.64(A).

Maine Revised Statutes Annotated, Title 17A, §401(2)(A), §651(1)(E), §208(1)(B).

Maryland Annotated Code, Art. 27, §36B(d) (Supp. 1983), §488.

Massachusetts General Laws Annotated, Ch. 265 §15A, Ch. 265 §15B, Ch. 265 §17, Ch. 265 §18, Ch. 265 §18A, Ch. 266 §14.

Michigan Compiled Laws Annotated, §750.82, §750.226, §750.529.

Minnesota Statutes Annotated, §609.222 (Supp. 1984), §609.245, §609.582(b) (Supp. 1984).

Mississippi Code Annotated, §97-3-7 (Supp. 1983), §97-3-79 (Supp. 1983), §97-17-23.

Missouri Annotated Statutes, §565.60 (Supp. 1984), §569.020, §569.160.

Montana Code Annotated, §45-5-202, §45-6-204.

Nebraska Revised Statutes, §28-309 (Supp. 1983)

Nevada Revised Statutes, §200.471(2)(b), §200.481(2)(d).

New Hampshire Revised Statutes Annotated, §631:1, §631:2, §635.1(II), §636:1(III).

New Jersey Statutes Annotated, §2C:12-1, §2C:14-2a.(4), §2C:18-2b.(2), §2C:15-1b.

New Mexico Statutes Annotated, §30-3-2(A), §30-16-2, §30-16-4

New York Penal Law, §120.10(1), §140.25(1)(a), §140-30, §160.15.

North Carolina General Statutes, §14-32, §14-34.2, §14-87.

North Dakota Criminal Code, §12.1-17-02, §12.1-22-01, §12.1-22-02.

Ohio Revised Code Annotated, §2903.12, §2911.01, §2911.11.

Oklahoma Statutes Annotated, §645, §801, §1431(2).

Oregon Revised Statutes, §163.175(1)(b), (c), §163.185(1), §164.225(1)(a), (c), §164.405(1)(a), §164.415(1)(a), (b).

Rhode Island General Laws, §11-5-2, §11-39-1, §11-47-3.

South Carolina Code, §16-3-610, §16-11-330.

South Dakota Codified Laws Annotated, §22-18-1.1(2), §22-32-1(2).

Tennessee Code Annotated, §39-2-101(b)(2), (3), §39-2-501, §39-3-401(c).

Texas Code Annotated, Penal Code, §22-.02(a)(4), §22.03(a), §29.03(a)(2).

United States Code Annotated, Title 18, §111, §112, §113(c), §2113(d), §2114, §2331(b).

Utah Code Annotated, §76-5-103(b), §76-6-203(b), (c), §76-6-302(a).

Vermont Statutes Annotated, §608(b), §1024(a)(2).

Code of Virginia, §18.2-58, §18.2-89.

Revised Code of Washington Annotated, §9A.52.020, §9A.56.200(1)(a), (b), §9A.36.010(1)(a).

West Virginia Code, §61-2-12.

Wisconsin Statutes Annotated, §943.10(2)(a), (b), §943.32(2).

Wyoming Statutes, §6-2-401(c)(ii), §6-2-502(a)(ii), (iii), §6.3-301(c)(i).

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
SEP 12 1985
JOSEPH F. ..... JR.
CLERK

NO. 85-215

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1985

DYNELL McMILLAN, LORNA PETERSON,
JAMES J. DENNISON, HAROLD L. SMALLS,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Does the Pennsylvania Mandatory Minimum Sentencing Act, in providing that proof at sentencing of a defendant's possession of a firearm during the commission of a violent felony offense shall be by a preponderance of the evidence, violate due process of law?

2. Does the Pennsylvania Mandatory Minimum Sentencing Act, in providing that a defendant's possession of a firearm during the commission of a violent felony offense shall be determined by the court at sentencing, rather than by a jury, violate a defendant's sixth amendment right to trial by jury?

3. Does the Pennsylvania Mandatory Minimum Sentencing Act, in providing that the prosecution shall notify a defendant of its intention to seek a mandatory sentence, invest such discretion in the prosecution as to violate due process of law?

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OPINION BELOW

The opinion of the unanimous Pennsylvania Supreme Court, Commonwealth v. Wright, et al., 494 A.2d 354 (Pa. 1985), is reproduced at Petitioners' Exhibit A.

JURISDICTION

Petitioners seek review by writ of certiorari pursuant to 28 U.S.C. §1257(3). The Commonwealth concedes that this Court has jurisdiction to consider the petition, but, for the reasons stated below, urges that this is not an appropriate case for granting certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ...

United States Constitution, Fourteenth Amendment:

> ... nor shall any State deprive any person of life, liberty, or property, without due process of law; ...

The Pennsylvania Mandatory Minimum Sentencing Statute, relating to certain felonies committed with a firearm, 42 Pa. C.S.A. §9712, is set forth in its entirety at pp. 3-4 of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioners were each separately convicted of a violent felony offense; each committed the offense with the use of a firearm. Under the Pennsylvania Mandatory Minimum Sentencing Act, 42 Pa.C.S.A. §9712, each was subject to a mandatory sentence of at least five to ten years imprisonment. Each petitioner received a more lenient sentence than that required by the Act, however, when the sentencing judges found the Act unconstitutional. The Commonwealth exercised its statutory right to appeal the sentences and the Pennsylvania Supreme Court unanimously reversed and remanded for resentencing, finding that the Act was constitutional.[1] Petitioners seek review of that holding.

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[1]The Honorable Robert N. C. Nix, Jr., Chief Justice, authored the majority opinion. The Honorable Rolf Larsen joined in the majority opinion and filed a concurring opinion, in which the majority also joined. Commonwealth v. Wright, et al., 494 A.2d 354 (Pa. 1985).

Petitioner Dynell McMillan was convicted, after a jury trial, of aggravated assault (18 Pa.C.S.A. §2702(a)(1)) and possessing an instrument of crime (18 Pa. C.S.A. §907). The trial evidence established that on November 10, 1982, McMillan had an argument in a bar with Jeffrey Baker over whether Baker owed him five dollars. As Baker walked home from the bar, McMillan accosted him, pulled out a gun and fired repeatedly, striking Baker once in the right buttocks. Baker required an operation to repair his wound. On January 30, 1984, the Honorable Murray C. Goldman held 42 Pa.C.S.A. §9712 unconstitutional and sentenced McMillan to a term of imprisonment of three to ten years for aggravated assault.

Petitioner Lorna Peterson was convicted, after a bench trial, of voluntary manslaughter (18 Pa.C.S.A. §2503) and

possessing an instrument of crime. The trial evidence established that on September 1, 1982, in the bedroom of the home she shared with her husband, Major Peterson, Lorna Peterson shot her husband three times in the arm and chest killing him. Peterson's testimony that she had shot in fear of being shot herself was rejected by the court. On March 21, 1984, the Honorable David N. Savitt held 42 Pa.C.S.A. §9712 unconstitutional and imposed a term of imprisonment of one to six years for voluntary manslaughter.

Petitioner James J. Dennison was convicted, after a bench trial, of aggravated assault, possessing an instrument of crime and carrying a firearm on the public street in Philadelphia (18 Pa.C.S.A. §6108). The trial evidence established that Dennison, age seventy-three, was in the habit of inviting neighborhood youths into his house

to drink beer. On July 30, 1983, Dennison, believing that one of these youths, Edward Zinni, had stolen three hundred dollars from his home, armed himself with a revolver and drove around in search of Zinni. Dennison found Zinni in a schoolyard, produced his gun, and when Zinni turned and ran, shot Zinni from a distance of fifteen feet. The bullet entered Zinni's back just below the shoulder and passed out through his neck, wounding Zinni seriously. On May 1, 1984, the Honorable Bernard J. Avellino authored an opinion on behalf of a three-judge court en banc finding 42 Pa.C.S.A. §9712 unconstitutional. Later, Judge Avellino sentenced Dennison to a term of imprisonment of eleven and one-half to twenty-three months for aggravated assault.

Petitoner Harold L. Smalls was convicted, after a bench trial, of robbery (18 Pa.C.S.A. §3701(a)(1)(i)), possessing an

instrument of crime, carrying a firearm on the public street in Philadelphia and criminal conspiracy (18 Pa.C.S.A. §903). The trial evidence established that on June 18, 1982, at about 1:00 a.m., Smalls entered a seafood store in Philadelphia and pointed a sawed-off shotgun at the owner, his wife and a friend. Smalls' two accomplices then entered the store and emptied the cash register. The three robbers then fled from the store together. On September 21, 1983, the Honorable Nicholas M. D'Alessandro found 42 Pa.C.S.A. §9712 unconstitutional and sentenced Smalls to a term of imprisonment of four to eight years for robbery.

SUMMARY OF ARGUMENT

Pennsylvania defines petitioners' crimes of robbery, aggravated assault and voluntary manslaughter, and the other offenses for which mandatory sentencing is now provided, without reference to the instrumentality by which each is accomplished. To deter the especially dangerous and increasingly frequent commission of these offenses with firearms, the Pennsylvania legislature has prescribed mandatory sentences of at least five to ten years imprisonment when the defendant visibly possessed a firearm while committing the offense. The Pennsylvania Mandatory Minimum Sentencing Act is a clearly constitutional method of punishing and attempting to deter armed felons.

Given the Pennsylvania legislature's decision to make possession of a firearm a sentencing factor, rather than an element

of newly defined crimes, this Court's decisions permit the legislative judgment to make possession of a weapon a matter to be proved at sentencing by a preponderance of the evidence. Likewise, this Court's cases refute petitioners' constitutional attacks on the statute's denial of the "right" to a sentencing jury and its requirement that the prosecution initiate the mandatory sentencing process by serving defendants with notice. Petitioners have not presented any challenge to the Pennsylvania Mandatory Minimum Sentencing Act that warrants this Court's review.

REASONS FOR DENYING THE WRIT

THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI SINCE THE PENNSYLVANIA MANDATORY MINIMUM SENTENCING ACT IS A CLEARLY CONSTITUTIONAL LEGISLATIVE ATTEMPT TO DETER THE USE OF FIREARMS BY CRIMINALS IN THE PERPETRATION OF VIOLENT FELONIES.

The relevant portion of Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa. C.S.A. §9712(a) ("the Act"), provides that anyone who is convicted of certain violent felony offenses, including voluntary manslaughter, aggravated assault and robbery, is subject to a mandatory minimum sentence of at least five years if the person visibly possessed a firearm during the commission of the crime.[2] The defendant is

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[2]The Act restricts the sentencing court's discretion in setting a maximum sentence only incidentally: another statute provides that the sentencing court shall impose a minimum term of

(Footnote 2 continued on next page.)

entitled to receive reasonable notice after conviction of the Commonwealth's intention to proceed under the Act. The applicability of the Act is then determined at sentencing, when the Commonwealth must prove the defendant's visible possession of a gun by a preponderance of the evidence. The court must consider evidence produced at trial, but both parties have an opportunity to present additional evidence. 42 Pa. C.S.A. §9712(b).

Petitioners argue that this Court should grant review to determine if the provision for proof of visible possession

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(Footnote 2 continued from previous page.)

imprisonment that shall not exceed one-half of the maximum. 42 Pa.C.S.A. §9756. Thus, the shortest maximum term under the Act is ten years. A prisoner becomes eligible for parole when he has served his minimum sentence. 61 P.S. §331.21. Prisoners may be eligible for more restrictive forms of release before the expiration of their minimum terms.

by a preponderance of the evidence to the court at sentencing violates their rights to due process and a trial by jury. They also contend that the Act, in requiring the prosecution to notify a defendant that the Act may be applicable, invests the prosecutor with so much discretion as to violate their due process rights. These claims are totally devoid of merit. They were correctly found by the unanimous Pennsylvania Supreme Court to be refuted by existing case law. None of petitioners' claims warrants this Court's discretionary review.

A. Since possession of a firearm is not an element of the crimes at issue, due process does not require proof of that fact beyond a reasonable doubt.

Petitioners assert that, to satisfy the requirements of due process, a defendant's possession of a firearm must be proven beyond a reasonable doubt. They

assert that possession of a weapon while committing a crime has traditionally been an element of crimes in Pennsylvania and other jurisdictions. Petitioners' argument misrepresents the nature of Pennsylvania's Mandatory Minimum Sentencing Act. When correctly viewed, it is clear, as the Pennsylvania Supreme Court determined, that Patterson v. New York, 432 U.S. 197 (1977), refutes petitioners' argument.

Petitioners maintain that the Act must be held to create a new set of crimes of which possession of a weapon is an element. The Pennsylvania legislature, however, explicitly stated that possession of a firearm is not an element of the crimes. 42 Pa.C.S.A. §9712(b). Neither did the legislature de facto establish new crimes of which possession of a firearm is an element. As the Pennsylvania Supreme Court recognized, the crimes included in the Act

carry ten or twenty year maximum sentences. Under the Act, the extent of punishment within the existing ranges is determined by a preponderance of the evidence; in no case may the penalty exceed the maximum for the crimes for which the defendant has already been convicted. A finding by the sentencing court that the defendant used a gun in the commission of the crime does not subject the defendant to a greater penalty than he could have received had the court found that no gun was used.

Thus, the legislature has not in any way altered the definitions of the offenses contained in the Act or the penalty that may attach to them. Rather, the legislature has taken one factor, the instrumentality used to commit the assault, which has always been considered as relevant to punishment, and dictated the precise weight to be given to that factor if it is a

firearm. As the Pennsylvania Supreme Court found, the legislature has not established new crimes, but merely foreclosed the possibility of leniency to those who commit certain crimes with guns. Commonwealth v. Wright, 494 A.2d at 357-58.

In this sentencing scheme, the Pennsylvania legislature lawfully assigned a preponderance of evidence standard to proof of possession of a firearm. In Patterson v. New York, supra, this Court approved a statutory scheme under which a defendant who committed murder while under the influence of extreme emotional disturbance could raise that claim as an affirmative defense, to be proven by the defendant by a preponderance of the evidence. This proof could reduce the grade of homicide from murder to manslaughter. This Court held that a state need not

> ... prove beyond a reasonable doubt every fact, the existence or non-existence of which it is willing to recognize as an exculpatory or mitgating circumstance affecting the degree of culpability or the severity of the punishment.

432 U.S. at 208. Thus, Patterson establishes that the Pennsylvania legislature could have made all robberies that are first degree felonies punishable by a mandatory minimum five years imprisonment unless the defendant proved "mitigating" facts, e.g., that he did not visibly possess a firearm during the commission of the robbery. The Pennsylvania legislature's 42 Pa.C.S.A. §9712 statutory scheme is less onerous on a defendant; clearly it does not violate due process.[3]

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[3]Thus, petitioners' attempt to characterize the issue here as a question left open by Patterson (Petition for Writ of Certiorari at 13), is unavailing. Above

(Footnote 3 continued on next page.)

Furthermore, petitioners' "question" has given other courts little pause. The federal circuit courts have uniformly found that the "dangerous special offender statute," which provides an additional sentence if the prosecution proves by a preponderance of the evidence that the defendant is "dangerous," 18 U.S.C.A. §3575(b), comports with due process. United States v. Davis, 710 F.2d 104 (3rd Cir.), cert. denied, 104 S. Ct. 505 (1983); United States v. Schell,

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(Footnote 3 continued from previous page.)

all else, Patterson reaffirmed the long-existing recognition that application of the reasonable doubt standard is dependent on the way a state defines a given offense. 432 U.S. 214-15. The Pennsylvania legislature has scrupulously continued to exclude possession of a weapon from the definition of the offenses here. Thus, it makes no difference for purposes of due process analysis whether possession of a weapon is deemed an "aggravating fact" or a "mitigating fact." Patterson makes clear that since possession of a weapon is not an element of the offenses, it need not be proven beyond a reasonable doubt.

692 F.2d 672 (10th Cir. 1982); United States v. Inendino, 604 F.2d 458, 463 (7th Cir.), cert. denied, 444 U.S. 932 (1979); United States v. Williamson, 567 F.2d 610, 615 (4th Cir. 1977); United States v. Bowdach, 561 F.2d 1160, 1175 (5th Cir. 1977); United States v. Steward, 531 F.2d 326, 334 (6th Cir.), cert. denied, 426 U.S. 922 (1976). In addition, two states have upheld the constitutionality of mandatory sentencing statutes that included proof of possession of a weapon by a preponderance of the evidence. State v. Gantt, 452 A.2d 477 (N.J. Super. 1982), aff'd, 478 A.2d 422 (N.J. 1984); State v. Mullins, 223 Kan. 798, 577 P.2d 51 (1978). But see State v. Wedge, 293 Or. 598, 652 P.2d 773 (1982) (possession of a firearm held to be element of offense in statute that called for mandatory sentences and also authorized enhanced sentences for recidivists).

B. The sixth amendment does not establish a right to have a jury decide factual issues at sentencing.

As established above, possession of a firearm is not an element of the crimes at issue. Therefore, just as due process does not require proof beyond a reasonable doubt, it does not require a jury trial on the issue. Petitioners contend, however, that this Court should grant review to determine if they have a sixth amendment right to a jury trial on the question of possession of a firearm. As well-settled case law establishes that there is no constitutional right to jury sentencing, and petitioners give no reason why this rule of law should be overruled, review is unwarranted. See Proffitt v. Florida, 428 U.S. 242, 252 (1976); Morgan v. Wainwright, 676 F.2d 476, 481 (11th Cir.), cert. denied, 459 U.S. 1018 (1982); James v. Twomey, 466 F.2d 718, 721 (7th Cir. 1972).

Petitioners assert that the issue here is distinguishable, because sentencing under the Act involves a discrete factual finding. Clearly, however, even where there is a disputed factual issue, such as a defendant's status as a recidivist, there is no right to jury sentencing. Clark v. Blackburn, 605 F.2d 163, 165-66 (5th Cir. 1979); Turnbough v. Wyrick, 551 F.2d 202, 203 (8th Cir.), cert. denied, 431 U.S. 941 (1977). This issue does not warrant grant of a writ of certiorari.

C. The discretion invested in the prosecutor to file notice under the Act is no different from the discretion invested in the prosecutor at every stage of a criminal prosecution, and clearly did not deny petitioners due process.

Finally, petitioners ask for review of a claim that the Pennsylvania Mandatory

Minimum Sentencing Act, by placing on the prosecution the duty to serve a defendant with notice of its intention to seek a sentence under the Act, gives the prosecution unbridled discretion and thus denies petitioners due process. Contrary to petitioners' assertion that this question was left open by United States v. Batchelder, 442 U.S. 114 (1979), Batchelder controls.

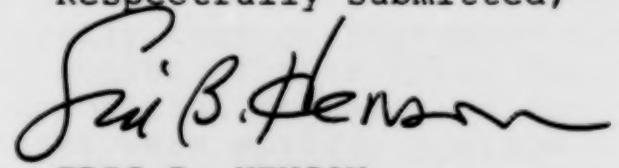
In Batchelder, this Court held that due process permits the prosecutor to choose between bringing charges under two statutes with identical elements but different penalties. In the unanimous opinion, Mr. Justice Marshall noted that the prosecutor's discretion in choosing between the two statutes was not unfettered, but was in fact subject to constitutional constraints against invidious selectivity in enforcement. United States v. Batchelder, 442 U.S. at 124-25.

Batchelder fully applies here; the prosecutor's responsibility to file notice to proceed under the Act is no different from the responsibility in Batchelder of choosing what crime to charge. Here the prosecutor's exercise of responsibility may remove discretion from the sentencing court as to the minimum term imposable. This does not distinguish this case from Batchelder, where the prosecutor's choice affected the court's discretion as to the maximum term. See Martin v. Parratt, 549 F.2d 50 (8th Cir. 1977). Since this claim too is directly controlled by authority that petitioners do not challenge, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, respondent, the Commonwealth of Pennsylvania, respectfully requests that the petition for writ of certiorari to the Pennsylvania Supreme Court be denied.

Respectfully submitted,



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IN THE SUPREME COURT
OF THE UNITED STATES

DYNELL McMILLAN, LORNA PETERSON, JAMES J. DENNISON, HAROLD L. SMALLS, Petitioners	:	OCTOBER TERM, 1985
v.	:	
COMMONWEALTH OF PENNSYLVANIA, Respondent	:	NO. 85-215

CERTIFICATION OF SERVICE

I, ERIC B.HENSON, Counsel for Respondent, hereby certify that on September 11, 1985, three (3) copies of this Brief for Respondent in Opposition to Petition for Writ of Certiorari were mailed, postage prepaid, to Gerald A. Stein, Esquire, 600 One East Penn Square Building, Philadelphia, Penn. 19107, Counsel of Record for Petitioners.

Eric B. Henson

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Sworn to and subscribed :
before me this 11th day :
of September, 1985, A.D. :

NOTARY PUBLIC

My Commission Expires:

JOYCE M. WHITE
Notary Public, Phila., Phila. Co.
My Commission Expires Sept. 19, 1987

JOINT

APPENDIX

No. 85-215 (3)

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1985

DYNEL McMILLAN, LORNA PETERSON,
JAMES J. DENNISON, HAROLD L. SMALLS,
Petitioners

V.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

JOINT APPENDIX

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Petition for Writ of Certiorari Filed August 8, 1985
Certiorari Granted October 7, 1985

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COMMON-WEALTH VS. DYNEL	1982—December 2543—Possessing Instruments Of Crime—Generally 2544—Aggravated Assault
MCMILLAN	1039—Voluntary Manslaughter

DATE	DOC.#	DOCUMENT DESCRIPTION
1- 3-83	D- 1	Notice of Mandatory Minimum Sentence Case, filed.
1-25-83	D- 2	Application for Assignment of Counsel, filed.
4-11-83	D- 3	Petition for Extension Under Rule 1100(c), filed.
4-26-83	D- 4	Petition for Extension Under Rule 1100(c), filed.
5-17-83-	——	Courtroom 232 Honorable Stanley L. Kubacki, Presiding Commonwealth's Petition to extend under rule 1100 GRANTED. New Run Date 8/11/83. Kubacki, J.
8- 2-83	——	Courtroom 446 Honorable Murray C. Goldman, Presiding Defendant enters a plea of NOT GUILTY Jury Trial Requested.
8- 3-83	——	Courtroom 446 Honorable Murray C. Goldman, Presiding After due deliberation, the jury returned with a VERDICT: GUILTY as to all above listed Bills. Pre-sentence and psychiatric examinations ordered. Post Trial Motions and/or sentencing deferred to 9/12/83, Room 617, at 3:00 P.M. Bail is hereby increased to $30,000.00 Goldman, J.

DATE	DOC.#	DOCUMENT DESCRIPTION
8-10-83	——	Courtroom 446 Honorable Murray C. Goldman, Presiding Defendant given Notice of Mandatory Minimum Sentence Guideline. Cont. 9/26/83, Rm. 617, for deferred sentence. Goldman, J.
8-12-83	D- 5	Post Verdict Motions, filed.
11- 1-83	D- 6	Supplemental Post Verdict Motions, filed.
11-10-83	D- 7	Additional Supplement Motions, filed.
1- 9-84	——	Courtroom 617 Honorable Murry C. Goldman, Presiding Post Trial Motions argued, heard and DENIED. Hearing on legality of Mandatory Minimum Sentencing Act is H.U.A. until 1/30/84, Rm 617. Goldman, J.
1-30-84	——	Courtroom 654 Honorable Murray C. Goldman, Presiding *SENTENCE OF THE COURT:* Bill #2543—Not less than 2½ nor more than 5 years in SCI, concurrent to Bill #2544. Goldman, J. Bill #2544—Not less than 3 nor more than 10 years in SCI, consecutive to sentence defendant now serving. Goldman, J.
2- 6-84	D- 9	Motion to Modify Sentence, filed.
2-14-84	——	Courtroom 313 Honorable Murray C. Goldman, Presiding Commonwealth Petition to Modify Sentence is DENIED. Goldman, J.

THIS TO CERTIFY THAT THE ABOVE IS A TRUE AND CORRECT COPY OF THE DOCKET ENTRIES.
/s/ S. ROUSE
C.P. APPEALS CLERK

COMMON-WEALTH VS. LORNA PETERSON

1982—September
1038—Possessing Instruments Of Crime—Generally
1039—Voluntary Manslaughter

DATE	DOC.#	DOCUMENT DESCRIPTION
9-16-82	D- 1	Notice of Mandatory Minimum Sentence Case, filed.
11- 4-82	D- 2	Omnibus Pre-Trial Motions, filed.
4- 6-83	——	Courtroom 613 Defense Motion challenging the constitutionality of the Mandatory Minimum Act is hereby DENIED. Ribner, J.
11-10-83	——	Courtroom 602 Honorable David N. Savitt, Presiding Motion to Suppress statements— *3* Physical Evidence—*gun* — Motion to Suppress Statements #*1* and #*3* GRANTED—Statement #*2* Motion DENIED. Motion to Suppress Physical Evidence DENIED. Defendant pleads NOT GUILTY Jury Trial Waived. Savvit, J.
11-16-83	——	Courtroom 602 Honorable David N. Savitt, Pesiding ADJUDGED: GUILTY as to all above charges. Sentence deferred, pending filing and disposition of Post Trial Motions, pre-sentence and psychiatric exams. Same Bail, Cont'd to 2/15/84, Room 602 at 3:30 P.M. Savvit, J.
11-22-83	D- 3	Motion for New Trial And/Or Judgment Of Acquittal, filed.
11-22-83	D- 4	Post-Verdict Motion to Bar Application Of Mandatory Sentencing Act, filed.

3-21-84	——	Courtroom 602 Honorable David N. Savitt, Presiding After argument, Motion for Arrest of Judgment and New Trial DENIED (the Opinion of the Court placed on the record). Motion to Bar Application of Mandatory Sentencing Act is GRANTED after argument (the Opinion of the Court placed on the record). *SENTENCE OF THE COURT:* #1038—Not less than 6 nor more than 18 months in the SCI at Muncy. to run concurrent with the sentence imposed on Bill #1039. Same bail to stand pending appeal conditioned upon an appeal being filed and perfected within two (2) weeks from today. Sentence stayed pending appeal. Savitt, J. #1039—Not less than 1 nor more than 6 years in the SCI at Muncy. Same bail to stand pending appeal conditioned upon an appeal being filed and perfected within two (2) weeks from today. Sentence stayed pending appeal. Savitt, J.
3-26-84	D- 5	Order for Hearing And To Vacate Sentence, filed.
	——	Order to Vacate Sentence is DENIED. Savitt, J.

THIS IS TO CERTIFY THAT THE ABOVE IS A TRUE AND CORRECT COPY OF THE DOCKET ENTRIES.

/s/ S. Rouse
C.P. APPEALS CLERK

———

COMMONWEALTH VS. JAMES J. DENNISON

1983—August
1306—Simple Assault
—Aggravated Assault
1308—Possessing Instruments Of Crime—Generally
1309—Carrying Firearms On Public Streets Or Public Property
—Unlawfully Carrying Firearm Without A License
—Carrying Firearms Without A License In A Vehicle

DATE	DOC.#	DOCUMENT DESCRIPTION
8-12-83	D- 1	Notice of Mandatory Minimum Sentence Case, filed.
8-19-83	D- 2	Application for Reduction of Bail, filed.
11-15-83	D- 3	Motion to Reduce Bail, filed.
——		Motion to Reduce Bail is GRANTED, Bail is hereby reduced to $100,000.00. Kubacki, J.
12-15-84	D- 4	Motion for Reasonable Compensation to Employ a Psychiatrist, filed
——		Motion to Employ a Psychiatrist is DENIED. Kubacki, J.
	D- 5	Petition to Consolidate, filed. Kubacki, J.
12-16-83	——	Courtroom 232 Honorable Stanley L. Kubacki, Presiding Commonwealth's petition to consolidate within CP 83-11-2352-9 is hereby

DATE	DOC.#	DOCUMENT DESCRIPTION
		GRANTED. Defense bail application in this case is GRANTED. Bail is reduced to $100,000.00
1-25-84	——	Courtroom 436 Honorable Bernard J. Avellino, Presiding Defendant pleads NOT GUILTY Jury Trial Waived ADJUDGED: *GUILTY,* as to all above listed charges. Sentence deferred until 3/21/84, Room 436 at 3:00 P.M., pending Pre-Sentence and Psychiatric examination. Bail Revoked. Avellino, J.
2- 3-84	D- 6	Motion for New Trial And/Or Arrest of Judgment, filed.
2-15-84	D- 7	Motion for Appointment of an Actuary, filed.
——		Motion for Appointment of an Actuary *GRANTED,* amount not to exceed $150.00 Avellino, J.
2-29-84	D- 8	Petition to Participate As Amicus Curiae, filed.
——		Petition to Participate As Amicus Curiae is hereby GRANTED. Avellino, J.
3-14-84	D- 9	Memorandum of Law on Behalf of Amicus Curiae In Support of Defendant's Motion, On Constitutional Grounds, to Bar Application of Mandatory Sentencing Act to this Case, filed.
4-12-84	——	Courtroom 436 Honorable Bernard J. Avellino, Presiding After a hearing and argument, defendant's

DATE DOC.# DOCKET DESCRIPTION

motion to bar application of mandatory minimum sentencing act is H.U.A. Cont to 5/10/84, Room 436 at 9:30 A.M.

Avellino, J.

5-10-84 —— Courtroom 436
Honorable Bernard J. Avellino, Presiding
SENTENCE OF THE COURT:
#1306—Not less than 11½ months nor more than 23 months in PCP. Credit time served from 7/30/83. Condition of parole, deft not to own a weapon.

Avellino, J.

5-10-84 —— Courtroom 436
SENTENCE OF THE COURT, CONT'D.
#1308—Not less than 11½ months nor more than 23 months in PCP. Sentence to run concurrent to sentence imposed on Bill #1306. Credit time served from 7/30/83, Same conditions.

Avellino, J.

#1309—The Court directs that this information merge with Bill #1306 for purposes of sentencing.

Avellino, J.

5-14-84 —— On 5/14/84, defendant to be released from PCP for seven (7) days to make arrangements for sale of his home and return to courtroom 436 on 5/21/84 at which time he is to be transported by the Sheriff to PCP to complete sentence.

Avellino, J.

5-17-84 D-10 Motion to Modify Sentence, filed.

5-21-84 —— District Attorney's motion to modify sentence is DENIED. Furlough contined an additional ten (10) days. Cont. to 5/30/84,

DATE DOC.# DOCUMENT DESCRIPTION

Rm 436, at 10:00 A.M. Sentence of 5/10/84 is hereby reinstated.

Avellino, J.

5-30-84 —— Courtroom 436
Honorable Bernard J. Avellino, Presiding
Defendant's furlough continued for a period of thirty (30) days on condition deft avoid contact with Michele Lynch, may not possess firearm and continue efforts to sell home.

Avellino, J.

7-20-84 —— Courtroom 436
Honorable Bernard J. Avellino, Presiding
Furlough order imposed on 5/10/84 for 5/14/84 is hereby revoked. Sentence of 5/10/84 is reinstated.

Avellino, J.

THIS IS TO CERTIFY THAT THE ABOVE IS A TRUE AND CORRECT COPY OF THE DOCKET ENTRIES.

Sarah Rouse
C.P. APPEALS CLERK

———

COMMON-WEALTH

VS.

HAROLD SMALLS

1982 August
1631 Carrying Firearms on Public Streets or Public Property, Unlawfully Carrying Firearm Without a License, Carrying Firearms without a License in a Vehicle
1632 Robbery
1633 Theft by Unlawful Taking or Disposition, Theft by Receiving Stolen Property
1634 Possessing Instruments of Crime Generally, Possessing Instruments of Crime-Concealed Weapon
1635 Recklessly Endangering Another Person
1636 Criminal Conspiracy

DATE	DOC.#	DOCUMENT DESCRIPTION
8/20/82	1	—Notice of Mandatory Minimum Sentence Case
9/23/82	2	—Motion to Suppress Statement, Identification Evidence and Arrest, filed
12/ 3/82	—	—Court Room 682 Motion to Suppress Physical Evidence and Statement is hereby denied, DiBona, Jr., J.
3/18/83	—	—Court Room 446 Court Reporter G. D'Angelis Defense Counsel Robert Lipshutz Presiding Honorable Nicholas D'Alessandro The defendant, having been arraigned, enters a plea of Not Guilty and waives his right to a jury trial.

DATE	DOC.#	DOCUMENT DESCRIPTION
3/18/83		—ADJUDICATION 1631 Defense demurrs to the Commonwealth's evidence as to Ct. # 3. Defurrer (sic) sustained as to Ct. #3. Guilty Ct. # 1 & 2 1632 Guilty 1633 Guilty 1634 Defense demurrs to the Commonwealth's evidence as to Ct. #2. Demurrer sustained as to Ct. # 2. Guilty as to Ct. # 1. 1635 Guilty 1636 Guilty Presentence investigation, psychiatric evaluation ordered. Sentence deferred pending filing and disposition of Post Trial Motions. Bail is revoked.
4/ 7/83	3	—Motion to Prevent Imposition of Mandatory Sentencing, filed.
——	4	—Commonwealth's Answer to Defendant's Motion to Prevent Imposition of Mandatory Sentencing, filed.
6/22/83	—	—Court Room 446 Court Reporter C. Muller Defense Counsel Robert Lipschutz Presiding Honorable Nicholas D'Alessandro Motion for New Trial and/or In Arrest of Judgment denied. Oral Argument heard on Mandatory sentencing. Defense brief to be submitted by 7/20/83. Commonwealth to respond by 8/17/83, D'Alessandro, J.
8/15/83	5	—Memorandum of Law, filed.

DATE DOC.# DOCUMENT DESCRIPTION

9/21/83 —Court Room 446
Court Reporter C. Muller
Defense Counsel Roebrt Lipschutz
Presiding Honorable Nicholas D'Alessandro
Decision: The defendant's Motion to Prevent Imposition of the Mandatory Sentencing Act, set forth in 42 PA-CSA Section 9712 is granted and the Court concludes that 42 PA-CSA Section 9712 is Unconstitutional.
SENTENCE:

Bill # 1631 —Not less than two and one-half (2½) years nor more than five (5) years in an appropriate State Correctional Institution, concurrent with the sentence imposed on Bill # 1632.

D'Alessandro, J.

Bill # 1632 —Not less than four (4) years, nor more than eight (8) years, in an appropriate State Correctional Institution. Credit for time served. A Drug and Alcohol Rehabilitation Program to be made available to the defendant.

D'Alessandro, J.

Bill # 1633 —Theft Charges merge with the Robbery Charge on Bill # 1632 for the purpose of Sentencing.

D'Alessandro, J.

Bill # 1634 —Sentence Suspended.

D'Alessandro, J.

Bill # 1635 —Not less than one (1) year, nor more than two (2) years, in an appropriate State Correctional Institution.
Concurrent with the sentence imposed on Bill # 1632.

D'Alessandro, J.

DATE DOC.# DOCUMENT DESCRIPTION

Bill # 1636 —Not less than four (4) years, nor more than eight (8) years, in an appropriate State Correctional Institution. Concurrent with the sentence imposed on Bill # 1632.

D'Alessandro, J.

DOCKET ENTRIES PAGE 4 APPELLATE LEVEL

NOTE: Only those entries specifically identified by either a date and/or document number are part of the record in this case

DATE DOC.# DOCUMENT DESCRIPTION

9/28/83 6 —Notice of Appeal to Supreme Court filed at # 106 SC 1983

Order pursuant to P.R.A.P. 1925(b), filed.

Statement of Matters Pursuant to P.R.A.P. 1925B

2/29/84 7 —Opinion filed, Judge D'Alessandro

—— 8 —NOTES OF TESTIMONY:

12/16/82, 3/18/83, 6/22/83, 9/14/83, 9/21/83

The undersigned, Clerk of the Court of Common Pleas of Philadelphia County, Appeals Division, hereby certifies that this is a true and correct copy of the whole and entire record.

/s/ Angela J. Bernhard

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
DEC 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-215

In The

Supreme Court of the United States

October Term, 1985

DYNEL McMILLAN, LORNA PETERSON,
JAMES J. DENNISON, HAROLD L. SMALLS,
Petitioners

V.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. Where a state imposes more severe punishment upon a finding that the criminal conduct was committed with a firearm does not the due process clause require that this factual determination be proved beyond a reasonable doubt?

2. Even if proof beyond a reasonable doubt is not constitutionally required, does not the due process clause require proof by clear and convincing evidence rather than by the preponderance of the evidence standard provided by the Pennsylvania Mandatory Sentencing Act?

3. Does a state violate a defendant's constitutional right to trial by jury by providing that the existence of a discrete fact concerning the commission of the offense which requires a mandatory sentence shall be determined by a judge at a post-trial hearing?*

---

*The petition for a writ of certiorari raised an additional question concerning an alleged due process violation because of prosecutorial discretion to invoke the Pennsylvania Mandatory Sentencing Act. That claim is not pressed here.

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No. 85-215

—o—

In The

Supreme Court of the United States

October Term, 1985

—o—

DYNEL McMILLAN, LORNA PETERSON, JAMES J. DENNISON, HAROLD L. SMALLS,
Petitioners

V.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

—o—

On Writ of Certiorari to the Supreme Court of Pennsylvania

—o—

BRIEF FOR PETITIONERS

—o—

OPINIONS BELOW

The opinion of the Pennsylvania Supreme Court for these cases is reported as *Commonwealth v. Wright* at 494 A.2d 354 (Pa. 1985) (Pet. App. 1a-28a). The Philadelphia Common Pleas Court opinion in *Commonwealth v. McMillan* is unreported (Pet. App. 29a-30a). The Philadelphia Common Pleas Court opinion in *Commonwealth v. Lorna Peterson* is unreported (Pet. App. 37a-41a). The opinion of the Philadelphia Common Pleas Court in *Commonwealth v. Dennison* is reported at 10 Phila. 531 (1984) (Pet. App. 42a-54a). The Philadelphia Common Pleas Court opinion in *Commonwealth v. Smalls* is unreported (Pet. App. 31a-37a).

JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on June 10, 1985. The petition for a writ of certiorari was timely filed on August 8, 1985, and was granted on October 7, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are set out in full in the petition for a writ of certiorari at pages 2-6. They are the Sixth and Fourteenth Amendments to the United States Constitution, 42 Pa. Cons. Stat. Ann. §9712 (Purdon 1982) and 42 Pa. Cons. Stat. Ann. §9721 (Purdon 1982).

—o—

STATEMENT

Each petitioner was found guilty in the Philadelphia Common Pleas Court of criminal offenses following notice by the Commonwealth that it would seek sentencing pursuant to the provisions of 42 Pa. Cons. Stat. Ann. §9712 (Purdon 1982) ("Mandatory Act"), requiring the imposition of a mandatory term of imprisonment of from five to ten years.[1]

[1]The Mandatory Act provides that a minimum sentence of at least five years must be imposed, and Pennsylvania law requires that the minimum sentence be no greater than one half of the maximum sentence imposed. 42 Pa. Cons. Stat. Ann. § 9756(b) (Purdon 1982).

The Mandatory Act provides that any individual found guilty at trial of any one of an enumerated list of felonies must be given the mandatory sentence of imprisonment if the judge decides at a subsequent *de novo* hearing that the Commonwealth of Pennsylvania ("Commonwealth") has established by a preponderance of the evidence that the defendant visibly possessed a firearm during the commission of the offense. At such a hearing, the judge is directed to consider the evidence offered at trial and any additional evidence offered by either the defendant or the Commonwealth. 42 Pa. Cons. Stat. Ann. §9712(b) (Purdon 1982).

In each case, no hearing was held pursuant to the Mandatory Act, because the lower court judge concluded that the Mandatory Act was unconstitutional. Each defendant therefore had a sentencing hearing pursuant to Pennsylvania's individualized discretionary sentencing scheme, 42 Pa. Cons. Stat. Ann. § 9721 *et seq.* (Purdon 1982), which governs all criminal cases in Pennsylvania except where a mandatory sentencing act is applied. Each defendant received a prison sentence significantly less than the sentence of imprisonment of at least five to ten years provided for by the Mandatory Act, and the Commonwealth appealed each of the cases to the Pennsylvania Supreme Court.

The cases were consolidated in the Pennsylvania Supreme Court along with another case (*Commonwealth v. Sandra Wright*, No. 4, E.D. Appeal Docket 1984). On June 10, 1985, the Pennsylvania Supreme Court, in a judgment and opinion (Pet. App. 1a-28a), held that the Mandatory Act was constitutional, vacated the judgments of sentence

in petitioners' cases, and remanded them for resentencing pursuant to that Act.

The individual relevant circumstances of each petitioner's case are as follows:

Petitioner McMillan was arrested by Philadelphia police on November 17, 1982 and charged with offenses in connection with the shooting of Jeffrey Baker. Informations were returned against him charging him with possession of an instrument of crime, aggravated assault, simple assault, recklessly endangering another person, and violations of the Uniform Firearms Act (Nos. 2543-2546, December Term, 1982). He was tried in the Common Pleas Court of Philadelphia before the Honorable Murray C. Goldman and a jury on the charges of aggravated assault, simple assault and possession of an instrument of crime. On August 4, 1983, the jury returned verdicts of not guilty of simple assault and guilty of aggravated assault (felony of the second degree) and possession of an instrument of crime. On January 30, 1984, Judge Goldman sentenced petitioner McMillan to a term of from three to ten years imprisonment on the aggravated assault charge and a concurrent term of imprisonment of from two and a half to five years on the possession of an instrument of crime charge.

Petitioner Peterson was arrested by Philadelphia police on September 2, 1982 and charged with offenses in connection with the shooting death of her husband, Major Peterson. Informations were returned against her, charging murder and possession of an instrument of crime (Nos. 1038-1040, September Term, 1982). Petitioner Peterson waived her right to a jury trial and was tried by the Hon-

orable David N. Savitt in the Common Pleas Court of Philadelphia. On November 16, 1983, Judge Savitt found her guilty of voluntary manslaughter and possession of an instrument of crime. On March 21, 1984, Judge Savitt sentenced petitioner Peterson to a term of imprisonment of from one to six years on the voluntary manslaughter charge and a concurrent six to eighteen months on the possession of an instrument of crime charge.

Petitioner Dennison was arrested on July 30, 1983 and charged by Philadelphia police with shooting Edward Zinni. Informations were returned against him, charging him with aggravated assault, possession of an instrument of crime, and violations of the Uniform Firearms Act (Nos. 1306-1309, August Term, 1983). He waived his right to trial by jury and was tried in the Common Pleas Court of Philadelphia before the Honorable Bernard J. Avellino who, on January 25, 1984, found him guilty of aggravated assault (felony of the second degree), possession of an instrument of crime, and carrying a firearm on a public street. On May 10, 1984, Judge Avellino sentenced petitioner Dennison to concurrent terms of eleven and a half to twenty-three months imprisonment on the aggravated assault and possession of an instrument of crime charges. No sentence was imposed on the charge of carrying a firearm on the public street, which was held to have merged for sentencing purposes.

Petitioner Smalls was arrested on June 22, 1982 by Philadelphia police and charged with offenses in connection with the robbery of In Sok Hyon. The District Attorney of Philadelphia returned Informations against him, charging violations of the Uniform Firearms Act, robbery,

theft, possession of an instrument of crime, recklessly endangering another person, and criminal conspiracy (Nos. 1631-1636, August Term, 1982). Petitioner Smalls waived his right to a jury trial and was tried in the Common Pleas Court of Philadelphia before the Honorable Nicholas M. D'Alessandro who found him guilty on March 18, 1983 of all charges, including robbery (felony of the first degree). On September 23, 1983, Judge D'Alessandro sentenced petitioner Smalls to a term of imprisonment of from four to eight years on the robbery charge. Petitioner also received concurrent terms of imprisonment of from four to eight years on the criminal conspiracy charge, two and a half to five years on the Uniform Firearms Act charges, and one to two years on the recklessly endangering another person charge. Sentence was suspended on the possession of an instrument of crime charge, and no sentence was imposed on the theft charge. which was held to have merged for sentencing purposes.

———o———

SUMMARY OF ARGUMENT

I

In Pennsylvania, defendants found guilty of a felony charge are generally sentenced pursuant to an individualized discretionary sentencing scheme whereby the judge may choose from a variety of sentencing alternatives, without being required to impose any fixed period of incarceration. Pursuant to the Mandatory Act, however, if the Commonwealth establishes by a preponderance of the evidence at a sentencing hearing that one of the enumerated

felonies was committed by the defendant while he visibly possessed a firearm, the court *must* sentence the defendant to at least five to ten years imprisonment. This factual finding is therefore absolutely determinative of whether the defendant receives this enhanced punishment of a mandatory term of imprisonment.

Possession of a firearm or other weapon during the commission of an offense has historically and consistently been recognized in the United States as an aggravating factor relating to the manner in which the crime was committed. Because this factual determination makes the conduct significantly more blameworthy, every jurisdiction raises the degree of the offense and/or punishment imposed once this fact has been established.

The due process requirement that the state prove all facts constituting criminal offenses beyond a reasonable doubt, as established by *In Re Winship*, 397 U.S. 358 (1970), would be meaningless if critical factual determinations concerning the conduct which the state seeks to punish could be deferred to a post-trial proceeding upon a lesser burden of proof. *Mullaney v. Wilbur*, 421 U.S. 684 (1975), ensured that the protections of *Winship* could not be diluted, holding that even when a defendant is guilty of some offense the state must still establish beyond a reasonable doubt those facts which would cause the defendant to be stigmatized and punished more severely. One found guilty of robbery cannot be subjected to the increased stigma and punishment of a mandatory prison sentence because he is found to be an armed robber, unless the state proves the additional critical facts beyond a reasonable doubt.

Patterson v. New York, 432 U.S. 197 (1977), which held that a state did not have to disprove beyond a reason-

able doubt affirmative defenses it chose to provide defendants, is not controlling. The instant case does not involve an affirmative defense nor a fact that is particularly burdensome to prove. The fact at issue is an aggravating one which has traditionally been considered an element of the offense, and it is constitutionally irrelevant that Pennsylvania has provided that this determination is to be made at a sentencing hearing rather than at trial.

The Mandatory Act sentencing hearing bears no relation to the traditional sentencing hearing where the court utilizes its discretionary power to select from a variety of sentencing alternatives after considering as much information as can be compiled concerning the offender, his character and background. A hearing held pursuant to the Mandatory Act is exactly like a trial: the only issue is the objective factual one of whether the prohibited conduct was committed. Accordingly, there is a due process requirement that the state establish the facts beyond a reasonable doubt, as at trial. Otherwise, as *Mullaney* emphasized, the states would be free to defer to sentencing critical factual determinations to avoid the constitutionally required reasonable doubt standard.

II

Should this Court hold that *Winship* and *Mullaney* do not require proof beyond a reasonable doubt, the preponderance of the evidence standard of proof, which is the lowest burden of proof known to the law and expresses no preference for either side's interests, is nonetheless constitutionally inadequate. Even with civil cases which involve substantial deprivations, this Court has held that due process of law requires proof by at least clear and

convincing evidence. *Santosky v. Kramer*, 455 U.S. 745 (1982); *Addington v. Texas*, 441 U.S. 418 (1979). Unlike the civil cases holding that due process requires proof by clear and convincing evidence, the consequences here are seriously penal in nature, and the fact to be established is specific and objective, rather than evaluative, subjective or predictive. In a criminal case, it is fundamentally unfair to permit the risk of error inherent in a preponderance of the evidence standard of proof to govern the determination of ultimate and critical offense-related facts where a mandatory sentence of imprisonment of five to ten years results if those facts are established.

III

It is well settled, and has been so for hundreds of years, that the constitutional right to a jury trial in criminal cases precludes a state from removing factual issues from the jury. *Duncan v. Louisiana*, 391 U.S. 145 (1968). A state may not abrogate a defendant's right to have a jury decide the critical ultimate facts concerning the criminal conduct which it wishes to punish simply by structuring its statutes so that the determination occurs at a sentencing hearing rather than at trial. This is especially true given the substantial punishment of a mandatory sentence of five to ten years imprisonment which is dependent on this factual determination.

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ARGUMENT

1. THE PENNSYLVANIA MANDATORY SENTENCING ACT VIOLATES DUE PROCESS OF LAW BECAUSE THE COMMONWEALTH DOES NOT HAVE TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT VISIBLY POSSESSED A FIREARM DURING THE COMMISSION OF THE OFFENSE.

Pennsylvania's Mandatory Act provides that at sentencing, if the Commonwealth establishes by a preponderance of the evidence that the defendant visibly possessed a firearm during the commission of any one of a number of enumerated offenses, he must receive a mandatory sentence of five to ten years imprisonment and the court has no power to suspend that sentence or place the defendant on probation.[2] Under Pennsylvania law the defendant will be eligible for parole only after he has served the mandated minimum sentence of five years imprisonment.[3] If the Commonwealth fails to prove these specified discrete facts,[4] the Court, pursuant to the usual Pennsylvania discretionary individualized sentencing scheme, may impose

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[2]42 Pa. Cons. Stat. Ann. § 9712(a) and (c) (Purdon 1982). *See* 42 Pa. Cons. Stat. Ann. § 9756(b) (Purdon 1982).

[3]Pa. Stat. Ann. tit. 61, § 331.21 (Purdon 1964). *See Pa. Stat.* Ann. tit. § 331.17 (Purdon 1964).

[4]The factual determination actually involves four discrete facts, each of which must be established: (1) visible; (2) possession; (3) of a firearm; (4) during the commission of the offense. 42 Pa. Cons. Stat. Ann. § 9712(a) (Purdon 1982).

any sentence ranging from no incarceration at all to the maximum imprisonment allowable by law.[5]

It is clear that the mandatory imposition of five to ten years imprisonment pursuant to the Mandatory Act constitutes a more onerous punishment than punishment pursuant to the discretionary sentencing scheme, a fact that is graphically illustrated by the cases before this Court, where each petitioner received a sentence less than the five to ten years imprisonment required by the Mandatory Act.[6] It is equally clear that the difference between

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[5]42 Pa. Cons. Stat. Ann. § 9721(a) (Purdon 1982). The discretion exercised pursuant to this provision is not completely unfettered because the judge must consider recommended guideline sentencing ranges in imposing sentence. 204 Pa. Admin. Code § 303, set forth as note following 42 Pa. Cons. Stat. Ann. § 9721 (Purdon 1982). A sentencing judge may deviate from the guidelines based on individual considerations, and the sentence will be reversed only if an appeal is granted at the discretion of the appellate court and the sentence is found to be unreasonable. 42 Pa. Cons. Stat. Ann. § 9781 (Purdon 1982).

[6]For three of the four defendants before this Court a sentence pursuant to the Mandatory Act would be an increase to the maximum sentence permissible under the law. As noted by the Pennsylvania Supreme Court, of the enumerated felonies to which the Mandatory Act applies, some provide for a possible maximum sentence of up to twenty years imprisonment, while aggravated assault and voluntary manslaughter provide for a possible maximum sentence of up to ten years imprisonment (Pet. App. 7a). The Court's statement that the Mandatory Act "merely mandates a minimum sentence of five years, which may be greater or less than the minimum sentence which might otherwise be imposed," (Pet. App. 8a) is thus inaccurate in the context of aggravated assault and voluntary manslaughter cases such as those involving petitioners McMillan, Peterson, and Dennison.

The practical consequences of the Mandatory Act for most defendants was recognized by the concurring opinion (joined in by the majority) which noted that it provides for the "length-

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sentencing pursuant to a discretionary sentencing act and one mandating a specified period of imprisonment is constitutionally significant.[7]

Pennsylvania has in effect established a separate class of felonies with a separate, more severe mandatory scheme of punishment, to be applied when the Commonwealth establishes that the enumerated felony was committed while the defendant visibly possessed a firearm. The legislature had the unquestioned power to make that distinction, but the statutory provision that the Commonwealth need prove

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ened incarceration for felons who make visible use of firearms in execution of their criminal deeds . . . " (Pet. App. 20a). Likewise, the New Jersey Supreme Court, in discussing its Mandatory Sentencing Act which provides for a sentence of at least three years imprisonment for enumerated felonies committed with a firearm, noted that there is a great difference between the certainty of severe punishment and the mere possibility of such punishment. *State v. DesMarets*, 92 N.J. 62, 85-86, 455 A.2d 1074, 1086 (1983). The legislature's "clear intention was to punish gun-related offenders with extreme, unpredecented severity, and with absolute certaintly." 92 N.J. at 88, 455 A.2d at 1088.

[7]In *Lindsey v. State of Washington*, 301 U.S. 397 (1937), the Court held that even if the maximum sentence permissible under the law is not changed, if judicial discretion to sentence to less than the maximum sentence is removed by a new sentencing statute, the *ex post facto* clause would be violated if the new provision were applied to offenses committed before the amendment was promulgated, since the new statute imposed a greater punishment than the former law. *See Weaver v. Graham*, 450 U.S. 24, 32 n. 17 (1981).

Likewise, a state violates a defendant's due process rights when he receives a mandatory sentence pursuant to an invalid act and the state refuses to permit resentencing on the basis that the mandatory penalty was the maximum allowable by law. *Hicks v. Oklahoma*, 447 U.S. 343 (1980). This Court concluded that resentencing was denied "simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision." 447 U.S. at 346 (emphasis in original).

that fact by only a preponderance of the evidence, rather than beyond a reasonable doubt, violates due process of law.

The due process clause mandates "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he [the defendant] is charged." *In Re Winship*, 397 U.S. 358, 364 (1970). This Court has insisted that the protections of *Winship* not be applied woodenly or mechanically and has refused to permit any possible diminution of this constitutional standard. For example, instructions which could be interpreted by the jury as easing the state's burden to prove each critical fact beyond a reasonable doubt at trial have been held to violate due process of law. *Francis v. Franklin*, 53 U.S.L.W. 4495 (U.S. April 29, 1985); *Sandstrom v. Montana*, 442 U.S. 510 (1979). *See United States v. Romano*, 382 U.S. 136 (1965). This Court has held that with respect to inferences and presumptions, "the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *Ulster County Court v. Allen*, 442 U.S. 140, 156 (1979). The *Winship* due process right would be gutted if a state were free to do as Pennsylvania has done and employ a device to eliminate the reasonable doubt standard in the determination of a fact critical to criminal liability.

Mullaney v. Wilbur, 421 U.S. 684 (1975), made clear that a state does not have this power. There, the state court had concluded that the fact of whether the defendant had acted in the heat of passion on sudden provocation in

a homicide case did not have to be proven beyond a reasonable doubt because homicide was considered a unitary offense and the state had already established beyond a reasonable doubt that the defendant was guilty of a voluntary and intentional homicide. Malice was implied unless the defendant established by a preponderance of the evidence that he acted in the heat of passion on sudden provocation. Like the Pennsylvania Supreme Court in this case, the state court held that the *Winship* due process right to proof beyond a reasonable doubt did not apply because it viewed the factual issue as being relevant "only upon the degree of and possible punishment" for the offense committed. *State v. Wilbur*, 278 A.2d 139, 146 (Me. 1971).

This Court reversed, noting that the factual determination was critical in determining whether there was malice involved, and therefore whether the defendant was guilty of murder rather than manslaughter. This Court held that *Winship's* due process requirement of proof beyond a reasonable doubt "is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability." 421 U.S. at 697-98.

In *Mullaney* this Court rejected the approach to constitutional analysis adopted by the Pennsylvania Supreme Court, which treated the state's definition of the crime as entirely dispositive. "*Winship* is concerned with substance rather than this kind of formalism. The rationale of that case requires an analysis that looks to the operation and effect of the law as applied and enforced by the state . . ." 421 U.S. at 699.

> Moreover, if *Winship* were limited to those facts that constituted a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.

421 U.S. at 698.

The Pennsylvania Supreme Court upheld the constitutionality of the Mandatory Act by misconstruing and misapplying *Patterson v. New York*, 432 U.S. 197 (1977).[8] *Patterson* held that New York, after establishing the prohibited conduct and requisite mental state in a murder prosecution beyond a reasonable doubt, did not have to prove beyond a reasonable doubt the lack of mitigating circumstances provided in an affirmative defense that the defendant acted under extreme emotional disturbance. This Court held that mitigating circumstances and affirmative defenses recognized by a state need not be disproven beyond a reasonable doubt, as a state which proves the commission of the criminal acts which it seeks to punish beyond a reasonable doubt has done all that is constitutionally required.[9]

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[8]*Patterson* did not purport to overrule *Mullaney*, and the continuing vitality of *Mullaney* has very recently been reaffirmed. *Reed v. Ross*, 104 S.Ct. 2901 (1984), retroactively applied *Mullaney* to a federal habeas corpus case involving collateral review. *Mullaney* had previously been held to apply retroactively to cases on direct review because, like *Winship*, it was viewed as a decision that vitally concerned the truth-finding function. *Hankerson v. North Carolina*, 432 U.S. 233 (1977). *See Ivan V. v. City of New York*, 407 U.S. 203 (1972).

[9]Affirmative defenses are generally applicable where the defendant acknowledges that he has committed all of the requisite acts charged and that he had the requisite mental state, but he seeks to justify or excuse what he has done to avoid

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In determining what facts must be proved beyond a reasonable doubt — in contrast to what constitutes an affirmative defense — this Court in *Patterson* held that the legislature's definition of the elements of an offense is usually dispositive, "but there are obviously constitutional limits beyond which the States may not go in this regard." 432 U.S. at 210. Clearly, if there were no limits, *Winship* and *Mullaney* would not establish an important constitutional right guaranteeing proof of critical facts beyond a reasonable doubt, but would simply provide a procedural rule which could be avoided by legislative draftsmanship.[10]

In this case the constitutional limits have been exceeded. This case does not involve a factual determination involving mitigation, justification or excuse for conduct which is otherwise criminal. It concerns the determination of a fact which, from both an historical and logical viewpoint, is an aggravating aspect of the offense itself and therefore has always been subject to the proof beyond a reasonable doubt standard.

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punishment. Mitigating circumstances "do not constitute a justification or excuse of the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability." *Black's Law Dictionary*, 903 (5th Ed. 1979). *See, e.g., United States ex rel. Goddard v. Vaughn*, 614 F.2d 929 (3d Cir. 1980); *United States v. Calfon*, 607 F.2d 29 (2d Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980); *Stump v. Bennett*, 398 F.2d 111 (8th Cir.), *cert. denied*, 393 U.S. 1001 (1968).

[10]*See, e.g.*, Dutile, *The Burden of Proof In Criminal Cases: A Comment on the Mullaney-Patterson Doctrine*, 55 Notre Dame Law 380, 381 (1980); Note, *The Constitutionality of Affirmative Defenses After Patterson v. New York*, 78 Colum. L. Rev. 655, 666-67 (1978); Note, *Burdens of Persuasion In Criminal Proceedings: The Reasonable Doubt Standard After Patterson v. New York*, 31 U. Fla. L. Rev. 385, 403 (1979).

Whether an individual has possessed or used a firearm or other weapon while engaging in criminal conduct has long been explicitly recognized by the states, including Pennsylvania, as an aggravating factor concerning the circumstances in which the crime was committed which, if proven, increases the defendant's culpability and subjects him to a higher grade of offense and/or more severe punishment.[11] Every state has criminal statutes for individual offenses, such as aggravated assault, which contain provisions making the offense more serious if the prosecution establishes beyond a reasonable doubt the possession or use of a firearm or other weapon during the commission of the offense.[12] Additionally, many jurisdictions explicitly

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[11]*E.g., People v. Vanard*, 6 Cal. 562 (1856); *Morman v. The State of Mississippi*, 24 Miss. 54 (1852). At least thirty-eight states had such statutes before 1900. A list of these former statutes is attached as Appendix "A" to this brief. *See* H. Underhill, *Treatise on the Law of Criminal Evidence* § 356, at 418-19 (1898). For hundreds of years some offenses have been considered more serious and the punishment made more severe if the offense was committed with a weapon or while armed. *See* 4 W. Blackstone, *Commentaries* *146, *193-194; J. Brydall, *A Compendious Collection of the Laws of England Touching Matters Criminal* 16 (1675).

[12]*See* W. LaFave and A. Scott, *Handbook on Criminal Law* § 82, at 613, § 94, at 702 (1972). Pennsylvania, for example, has graded as a simple assault, a misdemeanor of the second degree, an attempt to cause, or the causing of, bodily injury to another [18 Pa. Cons. Stat. Ann. § 2701(a)(1) (Purdon 1983)], while the offense is made more serious and upgraded to a misdemeanor of the first degree of aggravated assault if the individual "attempts to cause or intentionally or knowingly causes bodily injury to another *with a deadly weapon*," 18 Pa. Cons. Stat. Ann. § 2702(a)(4) (Purdon 1983) (emphasis added). Attached as Appendix "B" to this brief is a list of many such felony statutes currently in force in every jurisdiction in the United States. It is beyond doubt that under such statutory schemes the fact of

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provide for separate criminal offenses which increase the punishment for those who commit any of a number of enumerated offenses while possessing, carrying or using a firearm or deadly weapon.[13] And, except for Pennsylvania and New Jersey, those states with mandatory or enhanced sentencing statutes dependant on such a factual determination, that have considered the issue, have required proof beyond a reasonable doubt.[14]

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possession or use of a deadly weapon or firearm during the commission of the offense is an element of the offense which must be proven beyond a reasonable doubt. *See, e.g., State v. Platt,* 130 Ariz. 570, 574-75, 637 P.2d 1073, 1077-78 (Ariz. App. 1981); *State v. Gibson,* 452 So. 2d 553, 556 (Fla. 1984); *State v. Gould,* 395 So. 2d 647, 655 (La. 1980); *People v. Stubbs,* 100 Mich. App. 287, 291, 312 N.W. 2d 232, 235 (1981).

[13]At least eighteen jurisdictions have such statutes. A list of those statutes is attached as Appendix "C" to this brief.

[14]*Huf v. State,* 675 P.2d 268 (Alaska App. 1984); *Streeter v. State,* 416 So.2d 1203 (Fla. Dist. Ct. App. 1982); *State v. Kendall,* 90 N.M. 236, 241-42, 561 P.2d 935, 940-41 (N.M. Ct. App. 1977); *State v. Angus,* 581 P.2d 992 (Utah 1978); Iowa Code § 902.7 (1979); Me. Rev. Stat. Ann. tit. 17-A § 1252 (1983 & Supp. 1983-1984); Or. Rev. Stat. § 161.610 (1981).

A federal statute, 18 U.S.C. § 924(c), entitled "Penalties," which provides for an enhanced sentence if a firearm has been used or unlawfully carried in the commission of an offense, has also been interpreted, despite its denomination as a penalty provision, to create a separate offense requiring proof beyond a reasonable doubt at trial. *E.g., United States v. Ramirez,* 482 F.2d 807 (2d Cir.), *cert. denied,* 414 U.S. 1070 (1973); *United States v. Sidduth,* 457 F.2d 1198 (10th Cir. 1972). *See Simpson v. United States,* 435 U.S. 6, 10 (1978).

Only New Jersey has a mandatory or enhanced sentencing statute like Pennsylvania's which permits proof of the possession of a firearm to be established by a preponderance of the evidence. N.J. Stat. Ann § 2C: 43-6 c, d (West 1982). A New Jersey trial judge has held this provision constitutional. *State v. Gantt,* 452 A.2d 477, 186 N.J. Super. 262 (Law Div. 1982), *aff'd on other grounds,* 195 N.J. Super. 114, 478 A.2d 422 (App. Div. 1984), *cert. granted* (N.J. Feb. 28, 1985).

Thus, the states are virtually unanimous in recognizing that when this factual determination results in an increased punishment being applied, proof beyond a reasonable doubt is required regardless of the structure of the criminal statute[15] whether the fact is designated as an element of the offense, a separate offense, or is contained in a sentencing provision.[16]

Possession of a weapon during the commission of an offense is clearly an aggravating factor which makes the offense more serious and results in additional stigma and punishment. This factual determination bears no similarity to an affirmative defense or mitigating circumstance, and requiring proof beyond a reasonable doubt presents no undue burden on the prosecution.[17] In deciding the instant case the Pennsylvania Supreme Court recognized

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[15]This near unanimous judgment, while not conclusive in determining the line between constitutional and unconstitutional practices, is an important consideration. *See, e.g., Burch v. Louisiana,* 441 U.S. 130, 138 (1979); *McKeiver v. Pennsylvania,* 403 U.S. 528, 548 (1971); *Leland v. Oregon,* 343 U.S. 790, 798 (1952).

[16]In other contexts, courts also have consistently held that there is a right to proof beyond a reasonable doubt when the state provides that proof of additional facts concerning the commission of the offense would subject the offender to increased punishment, even when the additional facts are contained in penalty provisions rather than in the definition of the offense. *E.g., United States v. Alvarez,* 735 F.2d 461 (11th Cir. 1984); *United States v. Moore,* 540 F.2d 1088 (D.C. Cir. 1976); *United States v. DiGilio,* 538 F.2d 972 (3d Cir. 1976), *cert. denied, sub nom. Lupo v. United States,* 429 U.S. 1038 (1977); *Robinson v. United States,* 333 F.2d 323 (8th Cir. 1964); *Beigel v. People,* 683 P.2d 1188 (Col. 1984); *Commonwealth v. Sparks,* 492 A.2d 720 (Pa. Super. Ct. 1985).

[17]*See Patterson,* 432 U.S. at 209; *Speiser v. Randall,* 357 U.S. 513, 524 (1958); *Morrison v. People of State of California,* 291 U.S. 82, 88-89 (1934).

that the "visible possession of a firearm is a simple straightforward issue susceptible of objective proof,"[18] and this Court has noted in the past that the reasonable doubt standard is particularly appropriate for the proof of such facts.

> [T]he initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. In the latter cases the basic issue is a straightforward factual question—*did the accused commit the act alleged?* There may be factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.
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> The reasonable doubt standard functions in its realm because there the standard is addressed to specified knowable facts.

Addington v. Texas, supra, 441 U.S. 418, 429-30 (1979) (emphasis added).

The Pennsylvania Supreme Court concluded that proof beyond a reasonable doubt is not required because

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[18]Pet. App. 17a. *See and compare Mullaney,* where this Court held that proof beyond a reasonable doubt was required to establish a fact critical to criminal culpalibity even though it involved a defendant's mental state and proof of a negative.

the legislature stated that the factual determination was not an element of the offense and because the defendants are convicted criminals at the time the determination is to be made. The conclusion is erroneous because the analysis begs the constitutional question. What constitutes a crime is the blameworthy conduct which the state seeks to punish, including any specified aggravating attendant circumstances involving the prohibited conduct, such as the visible possession of a firearm during the course of the criminal activity. *E.g.,* H. Gross, *A Theory of Criminal Justice* 56-57 (1979); *W. LaFave and A. Scott, supra* n. 12, at § 8, at 45 n. 13, 46. While it is true that the defendant has been convicted before a hearing is held pursuant to the Mandatory Act, he has only been convicted of part of the crime that is actually charged.

The use or threatened use of a firearm is a finding that goes to the criminal act for which this defendant is punished, and thus is closer to an element of the crime than a characterization of the defendant.

* * *

Although the challenged statute is denominated an enhanced penalty statute, in effect it creates a new crime. The jury only considered evidence offered on the question of first degree robbery, and convicted him of that offense, but the defendant was sentenced on the basis of having been guilty of the crime of "first degree robbery using a firearm." If the legislature had actually described the crime as "first degree robbery using a firearm" the use of a firearm would certainly be an element and there would be no doubt defendant would have a right to a jury determination of guilt. The legislature cannot eliminate

constitutional protections by separating and relabeling elements of a crime.

State v. Wedge, 293 Or. 598, 607-08, 652 P.2d 773, 778 (1982).[19]

When a state determines that a robber should suffer significant additional stigma and punishment if he is found to be an armed robber, it cannot avoid the responsibility imposed by the due process clause to prove beyond a reasonable doubt the aggravating fact that he was armed.

> The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless. *E.g., Mullaney v. Wilbur*, 421 U.S., at 697-698, 95 S.Ct., at 1888-1889 (requirement of proof beyond a reasonable doubt is not "limit[ed] to those facts which, that if not proved, would wholly exonerate" the accused). Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar.

Jackson v. Virginia, 443 U.S. 307, 323-24 (1979).[20]

Just as the civil label applicable to juvenile proceedings was irrelevant to the decision in *Winship*, it is clear that "sentencing hearing" is not a talismanic phrase

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[19]The Oregon mandatory sentencing statute is similar to the one in Pennsylvania, but requires proof beyond a reasonable doubt. Or. Rev. Stat. § 161.610 (1981). In *Wedge*, the court held that there was a state constitutional right to a jury trial.

[20]The defendant, of course, has no constitutional cause to complain if the state permits an affirmative defense to the potential increased punishment of being found to be an armed robber. The state can subject "an armed robber to lesser punishment than he would otherwise receive if he proves by a preponderance of the evidence that the gun he used was unloaded or inoperative." *Patterson*, 432 U.S. at 229 n. 14 (dissenting opinion). The state need only prove beyond a reasonable doubt that the robbery was committed with a firearm.

which controls the disposition of the constitutional issue presented here.

At a sentencing hearing held pursuant to an individualized discretionary sentencing scheme, the requirement of proof beyond a reasonable doubt and other trial-related due process rights are not applicable because neither discrete factual findings nor the imposition of a specified mandatory sentence are required.[21] In *Williams v. New York*, 337 U.S. 241 (1949), this Court held that there was no right to confront and cross-examine the sources of information in a presentence report and emphasized that this was because the inquiry pursuant to a discretionary individualized sentencing scheme is completely different from that which takes place at trial.

> In a trial before verdict the issue is whether a defendant is guilty of having engaged in certain criminal conduct of which he had been specifically accused.
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> A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.

337 U.S. at 246-47 (footnote omitted).

Williams was held not to be controlling, and a right to confront and cross-examine adverse witnesses was recognized when the sentencing proceeding is dependent on a new finding of fact, which this Court observed was a "radically different situation" from the usual discretionary

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[21]*See, e.g., United States v. Grayson*, 438 U.S. 41 (1978); 18 U.S.C. § 3577.

sentencing proceeding. *Specht v. Patterson*, 386 U.S. 605, 608 (1967).[22]

Likewise, in *Bullington v. Missouri*, 451 U.S. 430 (1981), this Court held the double jeopardy clause applicable to a sentencing proceeding, which it concluded resembled a trial on guilt or innocence, and prohibited a second sentencing after insufficient evidence had been presented at the first hearing.[23]

> The Court already has held that many of the protections available to a defendant at a criminal trial also are available at a sentencing hearing similar to that required by Missouri in a capital case. See, *e.g.*, *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) (due process protections such as right to counsel, right to confront witnesses, and right to present favorable evidence are available at hearing at which sentence may be imposed based upon "a new finding of fact . . . that was not an ingredient of the offense charged," *Id.*, at 608, 87 S.Ct. 1211). Because the sentencing proceeding at petitioner's first trial was like the trial on the question of guilt or innocence, the protection afforded by the Double Jeopardy Clause to one acquitted by a jury also is available to him, with respect to the death penalty at his retrial.

Bullington v. Missouri, supra, 451 U.S. at 446 (footnote omitted).

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[22]*Specht v. Patterson* did not reach the issues in this case because it involved a state sentencing proceeding and, at the time, the constitutional rights to trial by jury and proof beyond a reasonable doubt were not binding on the states. *See Winship; Duncan v. Louisiana*, 391 U.S. 145 (1968).

[23]*Bullington* was followed in *Arizona v. Rumsey*, 104 S.Ct. 2305 (1984).

A hearing held pursuant to the Mandatory Act is even more like a trial on guilt or innocence than the sentencing proceedings involved in *Specht* and *Bullington*. In *Specht*, the factual determination was the non-objective finding of whether the defendant was a threat to the public or a habitual offender and mentally ill. And in *Bullington*, even if the factfinder made the factual determination that an aggravating factor existed, it could refuse to impose the authorized penalty of death despite this finding.

The only issue at a Mandatory Act sentencing hearing is the one which *Williams* recognized as a trial issue—whether the defendant committed certain criminal conduct.[24] Under the Mandatory Act, proof of the specified

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[24]At a hearing held pursuant to a recidivist sentencing statute, for example, the issue involved is proof of a historical fact which is a factual determination "essentially independent of guilt on the underlying substantive offense". *Oyler v. Boles*, 368 U.S. 448, 452 (1962). Because it is totally unconnected and unrelated to the alleged prohibited criminal activity with which the defendant is charged, the constitutional concerns of *Mullaney* do not apply.

A Mandatory Act hearing also differs significantly from a sentencing hearing pursuant to the Special Dangerous Offender Act (18 U.S.C. § 3575) which provides for proof by a preponderance of the evidence, a burden of proof deemed constitutionally adequate by many courts of appeals which have concluded that *Winship* and *Mullaney* do not dictate proof beyond a reasonable doubt for the factual determinations involved in that act. *E.g.*, *United States v. Schell*, 692 F.2d 672 (10th Cir. 1982); *United States v. Ilacqua*, 562 F.2d 399 (6th Cir. 1977); *United States v. Bowdach*, 561 F.2d 1160 (5th Cir. 1977). *Contra, United States v. Duardi*, 384 F. Supp. 874, 882-85 (W.D. Mo. 1974), *aff'd on other grounds*, 529 F.2d 123 (8th Cir. 1975). Pursuant to that act, a judge retains sentencing discretion to decide whether to impose an enhanced sentence and may consider, without limitation, any mitigating or aggravating information concerning the character, background and conduct of the defendant (18 U.S.C.

(Continued on following page)

criminal conduct then requires the inevitable and severe result of a mandatory sentence of imprisonment.

Unlike an individual discretionary sentencing hearing, the objective validity of the sentencing decision made pursuant to the Mandatory Act can be precisely measured.[25] If it is not held that the Constitution requires that it be measured by the reasonable doubt standard, then there would be no objective limits on the state, and critical, offense-related factual determinations could be deferred to sentencing to avoid that burden of proof.

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§ 3577). Indeed, even a predicate factual determination of whether the defendant is dangerous, which is made before this discretion is applied, likewise involves an evaluation of the character of the defendant and a prediction as to future conduct very similar to that at a normal sentencing hearing. *E.g.*, *United States v. Weston*, 708 F.2d 302, 309 (7th Cir.), *cert. denied*, 104 S.Ct. 397 (1983); *United States v. Williamson*, 567 F.2d 610 (2d Cir. 1977). A determination as to dangerousness is one which is much less susceptible to proof beyond a reasonable doubt. *See Addington v. Texas*, 441 U.S. 418, 428-29 (1979).

[25]Underlying the question of guilt or innocence is an objective truth: the defendant, in fact, did or did not commit the acts constituting the crime charged. From the time an accused is first suspected to the time the decision on guilt or innocence is made, our criminal justice system is designed to enable the trier of fact to discover that truth according to law. But triers of fact can err, and an innocent person can be pronounced guilty. In contrast, the law provides only limited standards for assessing the validity of a sentencing decision. The sentencer's function is not to discover a fact, but to mete out just desserts as he sees them. Absent a mandatory sentence, there is no objective measure by which the sentencer's decision can be deemed correct or erroneous if it is duly made within the authority conferred by the legislature.

Bullington v. Missouri, *supra*, 451 U.S. at 450 (1981) (dissenting opinion) (footnote omitted).

Many States impose different statutory sentences on different degrees of assault. If *Winship* were limited to a State's definition of the elements of a crime, these States could define all assaults as a single offense and then require the defendant to disprove the elements of aggravation—*e.g.*, intent to kill or intent to rob.

Mullaney, 421 U.S. at 699 n.24.

The American Bar Association has voiced exactly the same concerns:

At present, no constitutional right to a jury trial exists with respect to such factual issues (prior convictions), and these standards generally disfavor any role for the jury at sentencing. A limited exception, noted in standard 18-1.1, is the special case where statutory enhancements require an increase in the penalty in the event that specified facts (*e.g.*, use of a weapon) are shown, but these factors are subject to obvious dispute and also relate closely to the substantive elements of the offense.[15]

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[15]Thus, different considerations apply because otherwise the prosecution might subdivide a crime such as armed robbery, proving only the fact of robbery at trial under the reasonable doubt standard and the use of the weapon only at the less formalized sentencing hearing or through the presentence report.

A.B.A. Standards, *Sentencing Alternatives and Procedures*, Standard 18-6.5, Commentary at 18.471 (footnote omitted) (1980 Ed.).[26]

Because Pennsylvania requires the imposition of a mandatory punishment of at least five to ten years imprisonment if the Commonwealth establishes that the defendant visibly possessed a firearm during the commission of

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[26]*See* A.B.A. Standards, *supra*, Standard 18-1.1, Commentary at 18.23 - 18.24 (1980 Ed.).

the offense, without requiring proof beyond a reasonable doubt of that factual determination, the Mandatory Act, 42 Pa. Cons. Stat. Ann. §9712 (Purdon 1982), violates the principles of *Winship* and *Mullaney* and due process of law.

2. DUE PROCESS OF LAW IS VIOLATED BECAUSE THE MANDATORY SENTENCING ACT DOES NOT REQUIRE PROOF BY AT LEAST CLEAR AND CONVINCING EVIDENCE.

Even if this Court concludes that due process of law does not compel proof beyond a reasonable doubt of the factual determination to be made at a sentencing proceeding held pursuant to the Mandatory Act, this Court should nevertheless hold that providing for a burden of proof by a mere preponderance of the evidence is constitutionally inadequate.

Proof by a preponderance of the evidence is the standard employed in most civil cases[27] and is the lowest burden of proof known to the law. It permits the parties to "share the risk of error in roughly equal fashion,"[28] and is unlike "any other standard [which] expresses a preference for one side's interests."[29] This Court has noted that " 'the preponderance test is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence in order to determine which side has produced the greater quantum, without regard to its effect in convincing his mind of the truth of the proposition asserted.' " *Winship*, 397 U.S. at 367-68 (citation omitted).

[27] *See generally, e.g., California ex rel. Cooper v. Mitchell Brothers' Santa Ana Theater*, 454 U.S. 90, 93; *Wigmore On Evidence* § 2498, at 419 (3d Ed. 1940).

[28] *Addington v. Texas*, 441 U.S. 418, 423 (1979).

[29] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 (1983).

Even in some civil proceedings this Court has concluded that proof by a preponderance of the evidence is a constitutionally insufficient standard for determining the facts and "has mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money". *Santosky v. Kramer*, 455 U.S. 745, 756 (1982). In *Santosky* the preponderance standard was held constitutionally inadequate for determining whether a child was permanently neglected, because that determination would result in the termination of parents' rights in their natural child. Likewise, in *Addington v. Texas*, 441 U.S. 418 (1979), this Court held that it violated due process to involuntarily commit an individual to a mental hospital for an indefinite period where the state had to prove by only a preponderance of the evidence that the individual was mentally ill and required hospitalization for the protection of himself or others.

In *Santosky* and *Addington*, this Court held that there was no constitutional necessity for a reasonable doubt standard of proof because the state was not exercising punitive power, as in a criminal prosecution,[30] and because the

[30] *Santosky v. Kramer, supra*, 455 U.S. at 768; *Addington v. Texas, supra*, 441 U.S. at 428.

factual determinations did not involve the existence of an objective fact but were more in the nature of an evaluation and prediction of future conduct.[31] The sentencing proceeding in this case, in contrast, is directed to the specific, knowable fact of whether a defendant has committed a particular criminal act, which has traditionally required proof beyond a reasonable doubt, and requires no evaluative or predictive judgments.[32] Nonetheless, Pennsylvania has provided that the state need offer only proof by a preponderance of the evidence to require the imposition of a mandatory term of at least five to ten years imprisonment. Given the nature of, and consequences attending, this factual determination, this is not constitutionally permissible.

> [I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause. Even though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel. *Mempa v. Rhay*, 389 U.S. 128; *Specht v. Patterson*, 386 U.S. 605. The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process. See *Witherspoon v. Illinois*, 391 U.S. 510, 521-523.

Gardner v. Florida, 430 U.S. 349, 358 (1977) (footnote omitted).[33]

In the typical sentencing proceeding pursuant to an individualized sentencing scheme, as in *Williams v. New York, supra*, there are no legislatively required factual determinations to be made by the sentencing authority, and there is discretion to select from sentencing alternatives regardless of whatever factual information the court deems significant; therefore, there is no burden of proof. In other sentencing contexts, an initial factual determination might be required, so that some burden of proof is necessary for that factual determination, but this determination only qualifies the person for *possible* increased punishment, and the sentencing authority still retains discretionary authority to consider any information concerning the background and character of the individual before deciding on what sentence to impose. In that context the factual finding is not a final conclusive determination of the sen-

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[31]*Santosky v. Kramer, supra*, 455 U.S. at 769; *Addington v. Texas, supra*, 441 U.S. at 429-30.

[32]The Second Circuit has held that indefinite commitment under a state dangerous sex offender statute constitutionally requires proof by clear, unequivocal and convincing evidence rather than a lesser standard of proof employed by the state, but rejected a claim that the reasonable doubt standard was constitutionally required because the factual determination was in reality a subjective judgment about the individual rather than whether an alleged act was committed, as in a criminal case. *Hollis v. Smith*, 571 F. 2d 685, 695 (2d Cir. 1978).

[33]The Pennsylvania Supreme Court paid only lip service to *Gardner*. It engaged in an inappropriate balancing by noting that the defendant was a convicted criminal with no right to a particular sentence (Pet. App. 15a-18a), while "the Commonwealth seeks to protect the public from armed criminals and to deter violent crime and the illegal use of firearms generally, as well as to vindicate its interest in punishing those who commit serious crimes with guns." (Pet. App. 16a-17a).

It has not heretofore been viewed as constitutionally appropriate to provide less due process protections as the alleged criminal conduct and punishment become more serious. *E.g., Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Duncan v. Louisiana, supra*.

tence to be imposed.[34] By contrast, the factual determination at the sentencing proceeding pursuant to the Mandatory Act is a specific, objective one concerning the crime committed *and* it requires conclusive action, a mandated sentence of at least five to ten years imprisonment without consideration of any other factors or sentencing alternatives permitted.

This Court has held in the past, in *Specht v. Patterson, supra,* and *Bullington v. Missouri, supra,* that when the sentencing hearing resembles a trial on guilt or innocence greater due process rights must be afforded a defendant than are normally applicable.[35] Because "the function of legal process is to minimize the risk of erroneous decisions,"[36] due process requires that, to obtain the more

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[34] As this Court noted in another context, "while facts are plainly necessary for a proper resolution of those questions, they are only a first step in the process." *Parham v. J.R.*, 442 U.S. 584, 609 (1979).

One example of this type of sentencing scheme, where proof by a preponderance of the evidence has been held to be constitutionally sufficient is the Dangerous Special Offender Act, 18 U.S.C. § 3575. *See supra,* n. 24.

[35] *See supra,* pp. 23-25.

[36] *Addington v. Texas, supra,* 441 U.S. at 425.

> To experienced lawyers it is commonplace that the outcome of a lawsuit—and hence the vindication of legal rights—depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights.

Speiser v. Randall, 357 U.S. 513, 520-21 (1958).

severe punishment, the state must prove the fact that the defendant visibly possessed a firearm during the commission of the offense *at a minimum* by clear and convincing evidence.[37]

3. THE MANDATORY SENTENCING ACT UNCONSTITUTIONALLY DENIES A DEFENDANT A JURY DETERMINATION OF THE CRITICAL FACT CONCERNING THE OFFENSE COMMITTED WHICH, IF ESTABLISHED, REQUIRES THE IMPOSITION OF A LENGTHY MANDATORY TERM OF IMPRISONMENT.

Duncan v. Louisiana, 391 U.S. 145 (1968), guarantees a defendant in a state criminal prosecution a right to a trial by jury for all but petty offenses. This Court has explained that this constitutional right is founded on an "insistence upon community participation in the determination of guilt or innocence." *Id.* at 156. *Duncan* controls this case because under the Mandatory Act only a discrete factual determination concerning the alleged criminal activity which the state seeks to punish it to be made: whether a firearm was visibly possessed during the commission of the offense.[38] The consequences if that fact

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[37] Some commentators have concluded that proof beyond a reasonable doubt should be constitutionally required when a mandatory or enhanced sentence will result from proof of any objective fact at sentencing. *E.g., W. LaFave and A. Scott, supra* n. 12, at § 8, at 46; Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion In Criminal Cases,* 86 Yale L.J. 1299, 1326-27 n. 83, 1347 (1977).

[38] This factual determination concerning the offense committed is to be contrasted with an historical one unrelated to the alleged criminal conduct which the state seeks to punish, such as whether the defendant is a recidivist, for which there is no

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is established are inevitable and far from petty—mandatory imprisonment for at least five to ten years.[39] This Court has noted that in determining whether an aspect of a jury trial is constitutionally required, the "relevant inquiry . . . must be the function that the particular feature performs and its relation to the purposes of the jury trial". *Williams v. Florida*, 399 U.S. 78, 99-100 (1970).

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constitutional right to a jury trial. *E.g., Spencer v. State of Texas*, 385 U.S. 554, 560 (1967); *Clark v. Blackburn*, 605 F.2d 163 (5th Cir. 1979). Federal circuit courts have emphasized this difference in holding that there is a right to a jury determination of the possession or use of a firearm when an enhanced penalty provision depends on such a factual finding. *United States v. Sidduth*, 457 F.2d 1198, 1201 (11th Cir. 1972); *Jordan v. United States District Court for the District of Columbia*, 233 F.2d 362 (D.C. Cir. 1956), *vacated on other grounds, sub nom. Jordan v. United States*, 352 U.S. 904 (1957).

> In the second-offender situation, however, the criminal act which is proscribed is the same regardless of the background of the criminal; the previous offense is merely "an historical fact," as a result of which the penalty may appropriately be made more severe because of the demonstrated proclivities of the defendant.
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> On the other hand, where the aggravation arises from the manner in which the crime was committed, in substance a different aspect of the offense is sought to be punished. Accordingly, we think . . . that the facts in aggravation must be charged in the indictment and found to be true by the jury.

Jordan v. United States District Court for the District of Columbia, supra, 233 F.2d at 367 (footnote omitted).

[39]If, for example, a defendant like petitioner *Dennison* is subjected to this punitive scheme, his sentence of eleven and a half to twenty three months imprisonment, imposed pursuant to Pennsylvania's discretionary sentencing scheme, will be increased to five to ten years imprisonment.

An essential feature of the right to a jury which has been recognized for hundreds of years is that the jury decides all ultimate questions of fact concerning the offense committed.[40] The first ordinance adopted by Plymouth Colony in 1623 was one which contained the declaration that all criminal facts should be determined by a jury. *Maxwell v. Dow*, 176 U.S. 581, 609 (1900) (Harlan, J., dissenting). Before the American Revolution it was well settled in England that the jury, not the judge, was the exclusive finder of facts. Eunomus, *Dialogues Concerning The Law And Constitution Of England* § 53, at 205-207 (1768). "[T]he Province of Judge and Jury [are] distinct, the facts are left altogether to the jury, and the law does not control the fact, but arises from it." *Id.* at 207.

This clearly defined distinction between the roles of judge and jury, which does not permit a judge to interfere with the jury's unfettered discretion to decide all ultimate facts in a criminal case, was carefully guarded in the English Law[41] and has long been viewed as an essential com-

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[40]*E.g.*, J. Thayer, *A Preliminary Treatise On Evidence At The Common Law* 183-189 (1898); J. Vanderbilt, *Judges and Jurors: Their Functions, Qualifications and Selection*, § III, at 53-54 (1958).

> Whether such an act was done in such or such a manner, or to such or such an intent, the Jurors are Judges. For the Court is not Judge of these matters, which are evidence to prove or disprove the thing in issue.

J. Hawle, *The Englishman's Right. A dialogue between a Barrister at Law, and a jury-man* 8 (1680).

[41]W. Forsyth, *History of Trial By Jury* Ch. XII, § II, at 235 (1875).

ponent of the constitutional right guaranteed by the Sixth Amendment. *United States v. Battiste*, 24 Fed. Case 1042, 1043, 2 Sumner 240, 243 (C.C.D. Mass. 1835) (Story, J.).

> Jurors may be perverse, the ends of justice may be defeated by unrighteous verdicts; but so long as the functions of the judge and jury are distinct, the one responding to the law, the other to the facts, neither can invade the province of the other without destroying the significance of trial by court and jury.

Morissette v. United States, 342 U.S. 246, 274 (1952).

Therefore, a judge "may not direct a verdict of guilty no matter how conclusive the evidence",[42] nor may he remove any critical factual issue from the jury's consideration.[43]

The constitutional right to a jury trial also guarantees against indirect interference, prohibiting the use of impermissible conclusive presumptions or other devices which "invade the factfinding function which in a criminal case the law assigns solely to the jury". *Sandstrom v. Montana, supra,* 442 U.S. at 523. The constitutional right to have the jury decide the critical facts concerning the alleged criminal conduct is emasculated by a device such as that employed here which removes the factual determination from the jury.[44] It was this consideration which led the American Bar Association to conclude that there should be a right to a jury trial for a factual determination concerning the criminal conduct sought to be punished.[45]

> Although these standards disapprove of mandatory minimums established by the legislature (*see* standard 18-4.3), where such a statutory structure is employed against these standards' recommendation, it may be desirable and, some have argued, even constitutionally necessary that the jury make that determination as to the presence or absence of these enhancement factors at the same time it determines guilt. Such an approach ensures that both the rules of evi-

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[42]*United Brotherhood of Carpenters and Joiners of America v. United States,* 330 U.S. 395, 408 (1947).

[43]*E.g., United States v. Johnson,* 718 F.2d 1317, 1321-25 (5th Cir. 1983), (en banc); *United States v. Benedetto,* 558 F.2d 171, 176-77 (3d Cir. 1977); *DeCecco v. United States,* 338 F.2d 797 (1st Cir. 1964).

[44]Federal courts, confronted with statutes constructed so that penalty provisions provide for enhanced punishment if aggravating facts are present concerning the commission of the offense, have held that despite the statutory framework, evidence in support of those facts must be presented and established to the jury's satisfaction to justify the imposition of the enhanced punishment. *E.g., United States v. Kramer,* 289 F.2d 909, 921 (2d Cir. 1961), and federal cases cited *supra,* n. 14 and n. 16.

[45]Most states with mandatory or enhanced punishment provisions dependent on proof of the fact that the defendant possessed, used or carried a firearm or deadly weapon during the commission of the offense have recognized a right to have a jury make that determination. *State v. Parker,* 624 P.2d 294, 296 (Ariz. 1981); *Johnson v. State,* 458 S.W. 2d 409 (Ark. 1970); *People v. Najera,* 8 Cal.3d 504, 105 Cal. Rptr 345, 503 P.2d 1353 (1972); *State v. Overfelt,* 457 So. 2d 1385, 1387 (Fla. 1984); *State v. Baruth,* 691 P.2d 1266, 1275 (Idaho Ct. App. 1984); *State v. Duran,* 91 N.M. 35, 570 P.2d 39 (N.M. Ct. App. 1979); *State v. Wedge, supra; State v. Frazier,* 8 Wash. 2d 628, 503 P.2d 1073 (1972). *See* Colo. Rev. Stat. § 16-11-309 (1973 & Supp. 1984); Iowa Code § 902.7 (1979); N.D. Cent. Code § 12.1-32-02.1 (Supp. 1976-1983); Utah Code Ann. § 76-3-203 (1978 & Supp. 1985). *Contra, Huf v. State,* 675 P.2d 268 (Alaska Ct. App. 1984); *State v. Mullins,* 223 Kan. 798, 577 P.2d 51 (1978); *State v. Stewart,* 477 A.2d 300 (N.J. 1984).

> dence and the "reasonable doubt" standard will apply to this determination. It also removes any incentive for the legislature to define offenses broadly in order to push critical factual determinations back to the sentencing stage where less rigorous due process standards apply. In the sense that these standards disapprove of jury sentencing, the jury is not here "determining" the sentence by either choosing among sentencing alternatives or fitting the term of imprisonment to the relevant characteristics of the offender or the offense. Rather, it is making only a specific factual finding not unlike others traditionally given to the jury.

A.B.A. Standards, *Sentencing Alternatives and Procedures,* Standard 18-1.1, Commentary at 18.23-18.24 (footnotes omitted) (1980 Ed.).

The Mandatory Act violates the defendant's constitutional right to have the jury decide the facts by providing that the judge alone shall make the factual determination of whether the defendant visibly possed a firearm during the commission of the offense.

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CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be reversed and petitioners' judgments of sentence, which were vacated by the Pennsylvania Supreme Court, should be reinstated.

Respectfully submitted,

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APPENDIX "A"

ALABAMA:	Penal Code, 1866, tit. 1, ch. 8, §§ 114, 116, 130, *reprinted in* Penal Code of Ala. at 44, 47 (Reid & Screws 1866).
ALASKA:	Law of March 3, 1899, ch. 2, §§ 1901, 1904, 30 Stat.L. 1253-56, *reprinted in* Compiled Laws of the Territory of Alaska at 651-52 (Gov't Printing Office 1913).
ARIZONA:	Penal Code, tit. 8, ch. 9, § 394, *reprinted in* Revised Statutes of Arizona at 707 (Prescott Courier Print 1887).
ARKANSAS:	Law of February 16, 1838, ch. 44, div. III, art. V, § 3, *reprinted in* Revised Statutes of the State of Arkansas at 240, 246 (Weeks, Jordan & Co. 1838).
CALIFORNIA:	Law of April 16, 1850, div. 5, § 50 (amended 1855), *reprinted in* General Laws of the State of California at 238-39 (H.H. Bancroft & Co. 1865).
CONNECTICUT:	An Act for the Punishment of Certain Attrocious Crimes and Felonies, ¶ 2, *reprinted in* Acts and Laws of the State of Connecticut in America at 184-85 (Hudson & Goodwin 1805).
FLORIDA:	Law of August 6, 1868, ch. 43, § 38, *reprinted in* Digest of the Statute Law of Florida at 215, 217 (Walton 1872).

IDAHO:	Penal Code, tit. VII, ch. VI, § 6706, ch. IX, § 6732, *reprinted in* Revised Statutes of Idaho Territory at 729-31 (1877).
ILLINOIS:	Criminal Code, ch. 38, § 25, *reprinted in* Revised Statutes of the State of Illinois at 358 (Chicago Legal News 1880).
IOWA:	Law of February 16, 1843, ch. 49, § 20, *reprinted in* Revised Statutes of the Territory of Iowa at 169 (Hughes & Williams 1843).
LOUISIANA:	An Act of Crimes and Offenses—offenses against persons, § 10, *reprinted in* Revised Statutes of Louisiana at 136-137 (Clairborne 1856).
MAINE:	An Act of Crimes and Offenses, ch. 118, § 25, *reprinted in* Revised Statutes of the State of Maine at 827, 829 (Bailey & Noyes 1871).
MASSACHUSETTS:	An Act of Crimes and Punishments, tit. 1, ch. 160, §§ 22, 23, *reprinted in* General Statutes of the Commonwealth of Massachusetts at 792-93 (Wright and Potter 1860).
MICHIGAN:	An Act of Crimes and Punishment, tit. XXX, ch. 153, §§ 15, 16, *reprinted in* Revised Statutes of the State of Michigan at 659-60 (Bagg & Harmon 1846).
MINNESOTA:	An Act of Crimes and Punishments, ch. 89, §§ 33, 34, *reprinted in* Public Statutes of the State of Minnesota at 705-06 (Pioneer 1859).

MISSOURI:	Law of March 27, 1845, ch. 47, art. II, § 34, *reprinted in* Revised Statutes of the State of Missouri at 346, 350 (Dougherty 1845).
MONTANA:	Law of February 1, 1864, ch. 4, § 46, 1864 Mont. Territory Laws.
NEBRASKA:	Law of January 16, 1855, ch. 2, § 15, ch. 3, § 45, 1855 Neb. Laws.
NEVADA:	Law of November 26, 1861, ch. 28, § 47, 1861 Nev. Stat.
NEW JERSEY:	An act for the Punishment of Crimes, Law of March 18, 1796, *reprinted in* Laws of New Jersey at 214, § 35 (Patterson, 1800).
NEW MEXICO:	Law of February 15, 1854, ch. 3, § 28, ch. 4, § 9, 1853, N.M. Laws.
NEW YORK:	An act to establish a Penal Code, Law of 1854, ch. 74, § 1, *reprinted in* Penal Code of New York at 97, tit. 9, ch. 5, § 278, at 108-09, tit. 9, ch. 9, § 308 (Weed, Parsons & Co., Printers, 1865).
NORTH CAROLINA:	Crimes and Punishments. Law of March 2, 1883, *reprinted in* The Code of North Carolina at 408, ch. 25, § 997, (Banks & Bros., 1883).
NORTH DAKOTA:	Penal Code of North Dakota, Act of 1895, *reprinted in* Revised Codes of North Dakota at 1262, ch. 21, § 7115, at 1303, ch. 46, § 7401 (Tribune Co., Printers, 1895).
OKLAHOMA:	Act of 1893, *reprinted in* Oklahoma Statutes and Supreme Court Decisions Digest at 44 (Morgan, 1897).
OREGON:	Law of February 6, 1851, § 39, 1851 Or. Laws.

PENNSYLVANIA: Law of March 31, 1860, P.L. 382, § 100, *reprinted in* Laws of the General Assembly of the State of Pennsylvania (Maloney, 1860).

RHODE ISLAND: Act of Crimes and Punishments, Act of 1881, *reprinted in* Public Statutes of Rhode Island at 669, tit. 30, ch. 240, § 19 (Freeman & Co., Printers, 1882).

SOUTH CAROLINA: Act of Crimes and Punishments, Proceedings in Criminal Cases and Prisons, Act of 1858, ch. 12 at 743, *reprinted in* Revised Statutes of South Carolina at 710-11, ch. 128, § 11 (Republican, Printer, 1873).

SOUTH DAKOTA: Penal Code, Act of March 5, 1889, *reprinted in* Statutes of South Dakota at 1907, 1959 (Grantham, 1899).

TENNESSEE: Criminal law — Felonies, Law of January 30, 1870, *reprinted in* Tennessee Public Statutes since 1858 at 101, ch. 54, § 3 (Shankland, 1871).

TEXAS: The Penal Code, Act of April 12, 1883, *reprinted in* Revised Penal Code of Texas at 252, ch. 8, § 1244, art. 722, Act of February 21, 1879, *reprinted in* Revised Penal Code of Texas at 165, ch. 2, § 835, art. 496 (Willson, 1888).

UTAH: Penal Code, Act of November 15, 1897, *reprinted in* Revised Statutes of Utah at ch. 22, § 4195 (Young, Smith & Lee, 1898).

VERMONT: Crimes and Offenses, Law of December 21, 1880, *reprinted in* Vermont Statutes 1894, at 878, ch. 212, §§ 4913, 4918 (Tuttle, 1895).

VIRGINIA: Crimes and Punishments, Act of February 2, 1838, ch. 101, at 76, *reprinted in* Digest of Laws of Virginia at 210 (Tate, 1841).

WASHINGTON: Law of December 2, 1869, ch. 2, §§ 29, 31, 1869 Wash. Laws.

WEST VIRGINIA: Criminal Code, Act of 1865, ch. 88, §§ 1, 2, *reprinted in* Revised Statutes of West Virginia at 389, ch. 40, § 12 (Gilbert, 1878).

WISCONSIN: Of Crimes and Punishment Thereof, Act of 1849, *reprinted in* Revised Statutes of State of Wisconsin at 686, ch. 133, §§ 34, 35, at 689, ch. 134, § 9 (Sholes, 1849).

APPENDIX "B"

UNITED STATES:	18 U.S.C. §§ 111, 112, 113, 2113, 2114, 2231 (1982).
ALABAMA:	Ala. Code §§ 13 A-6-20(a)(1), 13 A-6-21(a)(2), 13 A-6-22(a)(3), 13 A-7-5(a)(1), 13 A-7-6(a)(1), 13 A-8-41(a)(1)(1982).
ALASKA:	Alaska Stat. §§ 11.41.200(a)(1), 11.41.210(a)(1), 11.41.220(a)(1), 11.21.230(a)(2), 11.41.500(a)(1), 11.46.300 (1983).
ARIZONA:	Ariz. Rev. Stat. Ann. §§ 13-1204(A)(2), 13-1206, 13-1508(A), 13-1904(A) (1978 & Supp. 1984-1985).
ARKANSAS:	Ark. Stat. Ann. §§ 41-1601(1)(a), 41-1602(1)(b), 41-1603(1)(c), 41-2102 (1977 & Supp. 1983).
CALIFORNIA:	Cal. Penal Code § 245(a)(2) & (c) (1970 & Supp. 1985).
COLORADO:	Colo. Rev. Stat. §§ 18-4-202(1), 18-4-302(1)(a) & (b) (1978).
CONNECTICUT:	Conn. Gen. Stat. Ann. §§ 53a-55a, 53a-59(a)(1), 53a-70a, 53a-94a, 53a-101(a)(1), 53a-134(a)(2), 53a-56a, 53a-60a, 53a-60c (West 1972).
DELAWARE:	Del. Code Ann. tit. 11, §§ 612, 613, 826, 832 (1979 & Supp. 1984).
DISTRICT OF COLUMBIA:	D.C. Code Ann. §§ 22-502, 22-505 (1981).
FLORIDA:	Fla. Stat. Ann. §§ 784.021(1)(a), 784.045(1)(b), 810.02(2)(b), 812.13(2)(a) (West 1976 & Supp. 1985).
GEORGIA:	Ga. Code Ann. §§ 16-5-21, 16-8-41, 16-11-106 (Supp. 1985).

HAWAII:	Hawaii Rev. Stat. §§ 707-711(1)(a) &(b), 708-810(1)(a), 708-840(1)(b) (1979 & Supp. 1984).
IDAHO:	Idaho Code §§ 18-905(a), 18-907(b) (Supp. 1985).
ILLINOIS:	Ill. Rev. Stat. ch. 38, §§ 12-2(a)(1), 12-4(b)(1), 18-2 (1972 & Supp. 1984-1985).
INDIANA:	Ind. Code Ann. §§ 35-42-2-1(3), 35-42-5-1, 35-43-2-1 (West Supp. 1985).
IOWA:	Iowa Code Ann. §§ 708.1(3), 711.2, 713.3, 713.4 (West 1979 & Supp. 1984-1985).
KANSAS:	Kan. Crim. Code Ann. §§ 21-3410(a), 21-3414(c), 21-3427 (Vernon 1981).
KENTUCKY:	Ky. Rev. Stat. §§ 508.010(a), 508.020(b) & (c), 511.020(a), 515.020(b) (1985).
LOUISIANA:	La. Rev. Stat. Ann. §§ 14.34, 14.37, 14.60(1), 14.64(A) (West 1974 & Supp. 1985).
MAINE:	Me. Rev. Stat. Ann. tit. 17-A, §§ 208(1)(B), 401(2)(A), 651(1)(E) (1983).
MARYLAND:	Md. Ann. Code art. 27, §§ 36(B)(d), 488 (1982 & Supp. 1985).
MASSACHUSETTS:	Mass. Gen. Laws Ann. ch. 265, §§ 15A, 15B, 17, 18, 18A, ch. 266, § 14 (Michie/Law. Coop. 1980).
MICHIGAN:	Mich. Comp. Laws Ann. §§ 750.82, 750.226, 750.529 (West 1968).
MINNESOTA:	Minn. Stat. Ann. §§ 609.222, 609.245, 609.582 (West Supp. 1985).

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MISSOURI:	Mo. Ann. Stat. §§ 565.060, 569.020, 569.160 (1979 & Supp. 1985).
MONTANA:	Mont. Code Ann. §§ 45-5-202, 45-6-204 (1983).
NEBRASKA:	Neb. Rev. Stat. § 28-309 (Supp. 1983).
NEVADA:	Nev. Rev. Stat. §§ 200.471(2)(b), 200.481(2)(d) (1973).
NEW HAMPSHIRE:	N.H. Rev. Stat. Ann. §§ 631:1, 631:2, 635:1 (II), 636:1 (III) (1974 & Supp. 1983).
NEW JERSEY:	N.J. Stat. Ann. §§ 2C:12-1, 2C:14-2a.(4), 2C:18-2b.(2), 2C:15-1b (West 1982 & Supp. 1985).
NEW MEXICO:	N.M. Stat. Ann. §§ 30-3-2(A), 30-16-2, 30-16-4 (1978).
NEW YORK:	N.Y. Penal Law §§ 120.10(1), 140.-25 (1)(a), 140-30, 160.15 (McKinney 1975 & Supp. 1984-1985).
NORTH CAROLINA:	N.C. Gen. Stat. §§ 14-32, 14.34.2, 14-87 (1981).
NORTH DAKOTA:	N.D. Cent. Code §§ 12.1-17-02, 12.1-22-01, 12.1-22-02 (1976 & Supp. 1985).
OHIO:	Ohio Rev. Code Ann. §§ 2903.11, 2903.12, '2911.01, 2911.11 (Page Supp. 1984).
OKLAHOMA:	Okla. Stat. Ann. tit. 21, §§ 645, 801, 1431(2) (West 1983).

OREGON:	Or. Rev. Stat. §§ 163.175(1)(b), (c), 163.185(1), 164.225(1)(a), (c), 164.405(1)(a), 164.415(1)(a), (b) (1981).
PENNSYLVANIA:	18 Pa. Cons. Stat. Ann. §§ 2701, 5121, 5501 (Purdon 1983).
RHODE ISLAND:	R.I. Gen. Laws §§ 11-5-2, 11-39-1 (1981 & Supp. 1985).
SOUTH CAROLINA:	S.C. Code Ann. §§ 16-3-610, 16-11-330 (Law. Co-op. 1985).
SOUTH DAKOTA:	S.D. Codified Laws Ann. §§ 22-18-1.1(2), 22-32-1(2) (1979 & Supp. 1985).
TENNESSEE:	Tenn. Code Ann. §§ 39-2-101 (b) (2), (3), 39-2-501, 39-3-401 (c) (1982 & Supp. 1985).
TEXAS:	Tex. Penal Code Ann. §§ 22-.02 (a) (4), 22.03 (a), 29.03 (a)(2) (Vernon 1974 & Supp. 1985).
UTAH:	Utah Code Ann. §§ 76-5-103(b), 76-6-203(b), (c), 76-6-302(a) (1978).
VERMONT:	Vt. Stat. Ann. tit. 13, §§ 608(b), 1024(a)(2) (1974).
VIRGINIA:	Va. Code §§ 18.2-58, 18.2-89 (1982).
WASHINGTON:	Wash. Rev. Code. Ann. §§ 9A.36.010(1)(a), 9A.52.020, 9A.56.200(1)(a), (b) (1977).
WEST VIRGINIA:	W.Va. Code § 61-2-12 (1984).
WISCONSIN:	Wis. Stat. Ann. §§ 943.10(2)(a), (b), 943.32(2) (West 1982).
WYOMING:	Wyo. Stat. §§ 6-2-401(c)(ii), 6-2-502 (a)(ii)(iii), 6.3-301 (c)(i) (1985).

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CONNECTICUT:	Conn. Gen. Stat. Ann. § 53A-216 (West. Supp. 1978-1984).
DELAWARE:	Del. Code Ann. tit. 11, § 1447 (1979 & Supp. 1984).
DISTRICT OF COLUMBIA:	D.C. Code Ann. § 22-3202 (1981 & Supp. 1985).
FLORIDA:	Fla. Stat. Ann. § 775.087 (West 1976 & Supp. 1980-1984).
GEORGIA:	Ga. Code Ann. § 16-11-106 (1984 & Supp. 1985).
ILLINOIS:	Ill. Ann. Stat. Ch. 38, §§ 33A-2, 33A-3 (Smith-Hurd Supp. 1978-1984).
MARYLAND:	Md. Ann. Code art. 27, § 36B(d) (1982 & Supp. 1985).
MICHIGAN:	Mich. Comp. Laws Ann. § 750.227 (b) (West Supp. 1985).
MISSOURI:	Mo. Ann. Stat. § 571.015 (1979).
NEBRASKA:	Neb. Rev. Stat. § 28-1205 (1979).
NEW HAMPSHIRE:	N.H. Rev. Stat. Ann. § 651.2 (IIb) (Supp. 1983).
NEW YORK:	N.Y. Penal Law §§ 265.08, 265.09 (McKinney 1984 & Supp. 1985).
RHODE ISLAND:	R.I. Gen. Laws § 11-47-3 (1981).
SOUTH DAKOTA:	S.D. Codified Laws Ann. § 22-14-12 (Supp. 1985).
TENNESSEE:	Tenn. Code Ann. § 39-6-1710 (1982).
VERMONT:	Vt. Stat. Ann. tit. 13, § 4005 (1974).
VIRGINIA:	Va. Code § 18.2-53.1 (1982).
WYOMING:	Wyo. Stat. § 6-8-101 (1985).

RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
JAN 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-215

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

DYNEL MCMILLAN, LORNA PETERSON,
JAMES J. DENNISON, HAROLD L. SMALLS,
Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does the Pennsylvania Mandatory Minimum Sentencing Act violate due process of law by providing that visible possession of a firearm during commission of a violent felony is not an element of the felony, but is merely a fact relevant to sentencing, and thus not subject to the requirement of proof beyond a reasonable doubt?

2. Does the Pennsylvania Mandatory Minimum Sentencing Act violate due process of law by providing that visible possession of a firearm during commission of a violent felony need be proven by only a preponderance of evidence at sentencing, and not by clear and convincing evidence?

3. Does the Pennsylvania Mandatory Minimum Sentencing Act violate the sixth amendment right to trial by jury by providing that visible possession of a firearm during commission of a violent felony shall be determined by the court at sentencing, rather than by a jury?

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STATEMENT

Petitioners, all of whom have been convicted of crimes that fall under the Pennsylvania Mandatory Minimum Sentencing Act, 42 Pa. Con. Stat. Ann. §9712 (Purdon 1982) ("the Act"), challenge the constitutionality of that sentencing statute. Each petitioner was separately convicted of a violent felony; each used a firearm in the commission of his offense. The Commonwealth of Pennsylvania timely filed notice that at sentencing it would seek a mandatory minimum term of imprisonment of at least five years, in accordance with the Act. Each of the sentencing judges before whom petitioners appeared found the Act unconstitutional, however, and each imposed a more lenient sentence than that required by the Act. The Commonwealth exercised its statutory right to appeal the sentences.[1] On appeal, the Pennsylvania Supreme Court unanimously found the statute constitutional, vacated the sentences, and remanded to the trial courts for resentencing in accordance with the Act.[2] This Court granted petitioners' request for certiorari review of the constitutionality of the Act.

Petitioner Dynel McMillan was convicted, after a jury trial, of aggravated assault[3] and possessing an instrument of crime.[4] The trial evidence established that on November 10, 1982, McMillan had an argument in a bar with Jeffrey Baker about a supposed five dollar debt. As Baker walked home from the bar, McMillan accosted him, pulled out a gun and fired repeatedly, striking Baker once in the right buttocks. Baker required an operation to repair his wound. On January 30, 1984, the

1. 42 Pa. Con. Stat. Ann. §9712(d) (Purdon 1982).

2. The Honorable Robert N. C. Nix, Jr., Chief Justice, authored the majority opinion. The Honorable Rolf Larsen joined in the majority opinion and filed a concurring opinion, in which the majority also joined. *Commonweaith v. Wright, et al.*, 494 A.2d 354 (Pa. 1985).

3. 18 Pa. Con. Stat. Ann. §2702 (a) (1) (Purdon 1983).

4. 18 Pa. Con. Stat. Ann. §907 (Purdon 1983).

Honorable Murray C. Goldman held the Act unconstitutional and sentenced McMillan to a term of imprisonment of three to ten years for aggravated assault. Judge Goldman imposed a concurrent two and one-half to five year sentence for possessing an instrument of crime (J.A. 2).

Petitioner Lorna Peterson was convicted, after a bench trial, of voluntary manslaughter[5] and possessing an instrument of crime. The trial evidence established that on September 1, 1982, in the bedroom of the home she shared with her husband, Major Peterson, Lorna Peterson shot her husband three times in the arm and chest, killing him. Peterson's testimony that she had killed her husband out of fear of being shot herself was rejected by the court. On March 21, 1984, the Honorable David N. Savitt held the Act unconstitutional and imposed a term of imprisonment of one to six years for voluntary manslaughter. Judge Savitt imposed a concurrent six to eighteen month sentence for possessing an instrument of crime (J.A. 5).

Petitioner James J. Dennison was convicted, after a bench trial, of aggravated assault, possessing an instrument of crime and carrying a firearm on the public street in Philadelphia.[6] The trial evidence established that Dennison, who was seventy-three years old, was in the habit of inviting neighborhood youths into his house to drink beer. On July 30, 1983, Dennison, believing that one of these youths, Edward Zinni, had stolen three hundred dollars from his home, armed himself with a revolver and drove his car in search of Zinni. When Dennison found Zinni in a schoolyard, Dennison produced his gun; when Zinni turned and ran, Dennison shot Zinni from a distance of fifteen feet. The bullet entered Zinni's back just below the shoulder and passed out through his neck, wounding Zinni seriously. On May

5. 18 Pa. Con. Stat. Ann. §2503 (Purdon 1983).
6. 18 Pa. Con. Stat. Ann. §6108 (Purdon 1983).

1, 1984, the Honorable Bernard J. Avellino authored an opinion on behalf of a three-judge court *en banc* finding the Act unconstitutional. Later, Judge Avellino sentenced Dennison to concurrent terms of imprisonment of eleven and one-half to twenty-three months for aggravated assault and possessing an instrument of crime (J.A. 8-9).

Petitioner Harold L. Smalls was convicted, after a bench trial, of robbery,[7] possessing an instrument of crime, carrying a firearm on the public street in Philadelphia, recklessly endangering another person[8] and criminal conspiracy.[9] The trial evidence established that on June 18, 1982, at about 1:00 a.m., Smalls entered a seafood store in Philadelphia and pointed a sawed-off shotgun at the owner, his wife and a friend. Smalls' two accomplices immediately entered the store and emptied the cash register. The three robbers fled from the store together. On September 21, 1983, the Honorable Nicholas M. D'Alessandro found the Act unconstitutional and sentenced Smalls to a term of imprisonment of four to eight years for robbery. Judge D'Alessandro imposed concurrent sentences on the other convictions (J.A. 12-13).

In each case the Commonwealth appealed to the Supreme Court of Pennsylvania. After briefing and consolidated oral argument, the court reversed the sentences. The court unanimously rejected due process and sixth amendment challenges to the Act, and remanded for sentencing in accordance with the Act. On October 7, 1985, this Court granted petitioners' joint petition for writ of certiorari.

7. 18 Pa. Con. Stat. Ann. §3701 (a) (1) (i) (Purdon 1983).
8. 18 Pa. Con. Stat. Ann. §2705 (Purdon 1983).
9. 18 Pa. Con. Stat. Ann. §903 (Purdon 1983).

SUMMARY OF ARGUMENT

Possession of a firearm is not an element of the crimes enumerated in the Pennsylvania Mandatory Minimum Sentencing Act because the Pennsylvania legislature explicitly stated that it is not. This Court's case law establishes that the legislature's determination is one within its province. The legislature has merely taken a traditional sentencing factor, the instrumentality used in committing a crime, and dictated the precise weight to be given if that factor is a firearm. The elements of the underlying crimes have not been changed, the potential penalties have not been changed, and the legislature has not lightened the prosecution's burden of proving the elements of any crime. Thus, the legislature acted within its power in making possession of a firearm merely a fact relevant to sentencing in the enumerated felonies. Because possession of a firearm is a sentencing factor and not an element of the crimes, the due process clause does not require proof of possession beyond a reasonable doubt. Likewise, the sixth amendment does not require a jury finding on the issue of possession.

Considerations of due process also do not require proof of possession of a firearm to be by clear and convincing evidence. The societal interest in protecting the public from dangerous criminal offenders is of the highest importance. A convicted criminal's liberty interest is no more important than the societal interest, especially since the criminal has no right to any specific sentence within the statutory range. In addition, the risk of error in the determination is very small. Therefore, a balancing of the revelant interests shows that a preponderance of evidence standard of proof is all that the due process clause requires.

ARGUMENT

The relevant portion of Pennsylvania's Mandatory Minimum Sentencing Act, 42 Pa. Con. Stat. Ann. §9712(a) ("the Act"), provides that anyone who is convicted of certain enumerated violent felonies, including voluntary manslaughter, aggravated assault and robbery, is subject to a mandatory minimum sentence of at least five years if the person visibly possessed a firearm during the commission of the crime. The Act incidentally restricts the sentencing court's discretion in setting a maximum sentence: another statute provides that the sentencing court must impose a minimum term of imprisonment that is one-half of the maximum or less. 42 Pa. Con. Stat. Ann. §9756 (Purdon 1982).[10] Thus, the shortest maximum term permissible under the Act is ten years.[11]

The defendant is entitled to receive reasonable notice after conviction of the Commonwealth's intention to proceed under the Act.[12] The applicability of the Act is

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10. A prisoner becomes eligible for parole when he has served his minimum sentence. Pa. Stat. Ann. tit. 61, §331.21 (Purdon 1964), but may enjoy a more restrictive form of release before expiration of the minimum. Pa. Stat. Ann. tit. 61, §§1051-1054 (Purdon Supp. 1985). The Act does not affect a prisoner's eligibility for pre-minimum release.

11. All of the crimes enumerated in the Act carry a maximum of ten years or more. Voluntary manslaughter, aggravated assault and an attempt to commit any of the crimes listed in the Act are second degree felonies, 18 Pa. Con. Stat. Ann. §§905 (attempt), 2503 (voluntary manslaughter), and 2702 (aggravated assault), punishable by maximum terms of ten years. 18 Pa. Con. Stat. Ann. §1103(2) (Purdon 1983). The other crimes are first degree felonies, 18 Pa. Con. Stat. Ann. §§2502 (murder), 2901 (kidnapping), 3121 (rape), 3123 (involuntary deviate sexual intercourse), and 3701 (robbery), and carry twenty-year maxima. 18 Pa. Con. Stat. Ann. §1103(1) (Purdon 1983).

12. Each petitioner here received actual notice before trial of the potential applicability of the Act.

then determined at sentencing, when the Commonwealth must prove by a preponderance of the evidence that the defendant visibly possessed a firearm during the commission of the crime. The court must consider evidence produced at trial, but both parties have an opportunity to present additional evidence. 42 Pa. Con. Stat. Ann. §9712(b).[13]

Petitioners argue that the Act is unconstitutional because it requires the Commonwealth to prove a defendant's possession of a firearm to the sentencing judge by only a preponderance of the evidence. They claim that the constitution requires proof of this fact to the jury beyond a reasonable doubt, or at least to the court by clear and convincing evidence. The Pennsylvania Supreme Court unanimously rejected those arguments. That court's determination was correct.

I. BECAUSE VISIBLE POSSESSION OF A FIREARM IS NOT AN ELEMENT OF THE CRIMES AT ISSUE, DUE PROCESS DOES NOT REQUIRE PROOF BEYOND A REASONABLE DOUBT, AND THE SIXTH AMENDMENT DOES NOT REQUIRE A JURY DETERMINATION OF THAT FACT.

Petitioners claim that visible possession of a firearm is an element of the crimes enumerated in the mandatory sentencing statute, and that, as a result, *In re Winship*, 397 U.S. 358 (1970), requires proof beyond a reasonable doubt. Petitioners misperceive the nature of the sentencing act. When correctly viewed, it is clear that possession of a firearm is only a fact relevant to sentencing and not an element of the crimes.

Possession of a gun is not an element of the enumerated crimes. These offenses were defined, their elements enumerated and the maximum possible punishment established in 1972. The 1982 Mandatory Sentencing Act did not affect the maximum permissible

13. The Act is reproduced in its entirety as "Appendix A."

punishment; rather the Pennsylvania legislature then repeated that possession of a gun is not an element of these offenses.

The statute explicitly provides that the section of the Act attaching a mandatory punishment to offenses committed with a firearm ". . . shall not be an element of the crime." 42 Pa. Con. Stat. Ann. §9712(b) (Purdon 1982). Because possession of a firearm is not an element of the enumerated crimes, the due process clause does not require proof beyond a reasonable doubt. *See Patterson v. New York*, 432 U.S. 197 (1977).

Petitioners' contention that *Mullaney v. Wilbur*, 421 U.S. 684 (1975), establishes that the legislature cannot designate the possession of a gun to be a fact relevant to sentencing and not an element of a crime is unfounded. It is incomprehensible given petitioners' concession that *Mullaney* permits recidivist sentencing. Brief for Petitioners at p.25 n.24. *Mullaney* held merely that when a state defines malice as an element of murder, it may not presume the existence of malice and place on a criminal defendant the burden of proving that he acted in the heat of passion in order to reduce the crime to manslaughter. This Court has made clear that *Mullaney* did not overrule the long-existing recognition that application of the reasonable doubt standard is dependent on the way a state defines a given offense. *Patterson v. New York*, 432 U.S. at 210 n.12. Therefore, *Mullaney* does not prevent the Pennsylvania legislature from defining a crime the way it sees fit.

As *Patterson* recognized, of course, there are constitutional limits to the State's power in this regard. Petitioners argue that Pennsylvania has gone beyond those limits, and therefore that its provision that possession of a firearm is not an element of a crime is of no effect. The examples of constitutional violations given in *Patterson*, however, make it apparent that Pennsylvania's statute is within constitutional limits. *See, e.g., Tot v. United*

States, 319 U.S. 463 (1943) (unconstitutional to presume that convicted felon who possessed a weapon obtained it in interstate commerce and thus place on defendant the burden of proving that he did not receive it in interstate commerce); *McFarland v. American Sugar Refining Company*, 241 U.S. 79 (1916) (unconstitutional to presume from price sugar refiner paid for sugar that refiner was party to a monopoly and thus place on defendant burden of proving that it was not acting in restraint of trade).

Furthermore, the declaration that possession of a firearm is not an element of the crimes enumerated in the Act is not a mere artifice to remove from the prosecution a burden it would otherwise have to shoulder. The Pennsylvania legislature has taken seven violent felonies and mandated a minimum sentence. The legislature has not in any way altered the definitions of any of these felonies. Likewise, since all of the felonies carry ten or twenty-year maxima, *supra* at 5 n.11, the legislature has not increased the potential punishment available. Under the Act, a judge's or jury's guilty verdict, a necessary prerequisite to imposition of any sentence, establishes that all of the elements of the eligible crimes have been established beyond a reasonable doubt. The guilty verdict empowers and obliges the trial court to impose punishment in accordance with law. The extent of punishment is determined by a preponderance of the evidence, but in no case may the penalty exceed the maximum for the crime for which the defendant has already been convicted.

Thus, the Pennsylvania legislature has not changed the definition of any crime or the potential penalty that may attach to it.[14] Rather, it has taken one factor, the

14. Petitioners hinge their argument on the conclusion that sentencing under the Act is a more onerous punishment than punishment pursuant to a wholly discretionary scheme, citing *Lindsey v. Washington*, 301 U.S. 397 (1937). The Pennsylvania legislature complied with *Lindsey* when it made the Act apply only to offenses

(*Continued on following page*)

instrumentality used in committing a violent felony, that has always been considered by sentencing courts to be a factor bearing on punishment, and dictated the precise weight to be given to that factor if it is a firearm.[15] There-

(*Continued from previous page*)

committed after its effective date. Act of March 8, 1982, P.L. 1969, No. 54, §4. *Lindsey* held that the *ex post facto* clause was implicated when a statute removed judicial discretion to impose less than the maximum term of imprisonment for a crime, because the statute was to the "substantial disadvantage" of a convicted criminal. 301 U.S. at 402. The Court stated, however, that: "We need not inquire whether this is technically an increase in the punishment annexed to the crime . . ." 301 U.S. at 401. Thus, *Lindsey* does not support petitioners' view that the Pennsylvania legislature has increased the punishment for the crimes enumerated in the Act. Moreover, as a convicted criminal has no substantive right to any definite sentence within the range imposable by statute, *Gardner v. Florida*, 430 U.S. 349, 358 (1977), it is clear that the Pennsylvania legislature, in setting mandatory minimum sentences, has not unconstitutionally increased the punishment for the enumerated felonies: convicted criminals have no constitutional right to leniency.

15. Petitioners recognize that there is no proof requirement for a fact such as possession of a firearm when it is a factor to be considered in a hearing under an individualized discretionary sentencing scheme. Brief for Petitioners at 23. They argue that due process requires proof beyond a reasonable doubt when that same fact removes the sentencer's discretion. The distinction petitioners make is unfounded. The prescription of punishments is a legislative, not a judicial, function. *Albernaz v. United States*, 450 U.S. 333, 344 (1981); *Whalen v. United States*, 445 U.S. 684, 689 (1980). A convicted criminal in a non-capital case has no "right" to individualized determination of his sentence. Therefore, in considering the requirements of due process, it is immaterial whether a specific fact is merely one factor relevant in handing down a discretionary sentence or, as here, a factor that removes a portion, or even all, of the sentencer's discretion. Indeed, this Court has noted that some commentators regard the principal problem of modern sentencing schemes to be the sentencer's unchecked power to be arbitrary or discriminatory. *United States v. DiFrancesco*, 449 U.S. 117, 143 (1980). Contrary to petitioners' argument that the removal of discretion from the sentencer requires greater due process protections, a reduction in the risk that the criminal will receive an arbitrary or discriminatory sentence would more rationally be held to reduce the need for additional procedural due process protections.

fore, the Act does not improperly remove a burden of proof from the prosecution.[16]

Indeed, consistent with *Patterson v. New York*, 432 U.S. 197 (1977), the Pennsylvania legislature could have gone further and required the defendant to disprove his visible possession of a firearm. In *Patterson*, this Court approved a statutory scheme under which a defendant who committed murder while under the influence of extreme emotional disturbance could raise that claim as an affirmative defense, which he had to prove by a preponderance of the evidence. This proof could reduce the grade of homicide from murder to manslaughter. This Court held that a state need not ". . . prove beyond a

16. Clearly the legislature did not enact the mandatory sentencing statute in order to lighten the prosecution's burden. The Act was motivated by the prosecution's inability to secure appropriate sentences following convictions, not by any inability to secure convictions in the first place. All of the crimes enumerated in the Act were enacted as part of the Crimes Code, Act of December 6, 1972, P.L. 1482, No. 334, §1, effective June 6, 1973, 18 Pa. Con. Stat. Ann. §101 *et seq*. The Act was passed eight years later, as an amendment to the Sentencing Code, Act of December 30, 1974, P.L. 1052, No. 345, §1, 42 Pa. Con. Stat. Ann. §9701 *et seq*. At the same time the legislature passed the Act, it enacted two other mandatory sentencing provisions, each requiring mandatory minimum sentences of at least five years. One involves felonies committed on public transportation facilities, 42 Pa. Con. Stat. Ann. §9713 (Purdon 1982), and the other involves sentences for repeat offenders, 42 Pa. Con. Stat. Ann. §9714 (Purdon 1982). The procedure in each of those two statutes is identical to the procedure in the Act. Thus, it is apparent that the Pennsylvania legislature sought to punish and deter particular crimes and criminals by imposing a uniform minimum sentence that precludes lenient treatment. The legislature did not engage in the sort of burden shifting that the due process clause prohibits. Its statute is not unconstitutional. *Cf. United States v. DiFrancesco*, 449 U.S. 117, 142 (1980) (federal dangerous special offender statute, as a law that represents a considered legislative attempt to attack a specific problem, is not an example of government oppression against which the double jeopardy clause protects, and its procedures did not result in double jeopardy violation).

reasonable doubt every fact, the existence or nonexistence of which it is willing to recognize as an exculpatory or mitigating circumstance affecting the degree of culpability or the severity of the punishment." 432 U.S. at 208. Thus, *Patterson* establishes that the Pennsylvania legislature could have made all robberies that are first degree felonies punishable by a mandatory five-year minimum unless the defendant proved "mitigating" facts, *e.g.*, that he did not visibly possess a firearm during the commission of the robbery.[17] The legislature, in enacting the instant statute, having adopted a less onerous statutory scheme, clearly did not violate due process.

Petitioners argue that the Act nevertheless runs afoul of due process in making possession of a firearm merely a fact relevant at sentencing because many legislatures in the past have made possession of a weapon an element of various crimes. Brief for Petitioners at 17-19. Those statutes are of no moment. First, they are typically much different from the statute under review. Generally, when possession of a weapon is an element, the statutory scheme treats the armed crime as a higher grade of offense than the unarmed crime. *See, e.g.*, 18 Pa. Con. Stat. Ann. §2702 (Purdon 1983); Pa. Stat. Ann. tit. 18, §4705 (Purdon 1963) (repealed Act of December 6, 1972, No. 334, §5, effective June 6, 1973). In addition, most of those statutes are directed at all deadly weapons, not just firearms. Pennsylvania has chosen a different scheme to deter felonies committed with guns. As this Court has long recognized, the due process clause must

17. Petitioners virtually concede this point. They quote the dissent in *Patterson* for the proposition that the state may place on a convicted armed robber the burden of proving that his gun was inoperative in order to reduce his potential sentence. *Patterson*, 432 U.S. at 229 n.14 (dissenting opinion). Brief for Petitioners at 22 n.20. Certainly, a state scheme in which a convicted robber may reduce his punishment by overcoming the prosecution's proof that he was armed or by proving that he was unarmed would be legally indistinguishable and no less constitutional.

not be applied so restrictively as to stifle the diversity of local legislative response to problems. *See Spencer v. Texas*, 385 U.S. 554, 566 (1967) ("Tolerance for a spectrum of state procedures dealing with a common problem of law enforcement is especially appropriate here."). *See also Apodoca v. Oregon*, 406 U.S. 356, 376 (1972) (Powell, J., concurring); *Fay v. New York*, 332 U.S. 261, 296 (1947); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *Cf. Spaziano v. Florida*, 104 S.Ct. 3154 (1984) (that most states provide for jury sentencing in capital cases does not establish contemporary standards of decency for eighth amendment purposes). Therefore, that states have formulated different statutory schemes to punish armed felons does not establish a due process imperative.[18] The Pennsylvania legislature has chosen to designate visible possession of a firearm as a fact relevant to sentencing and not an element of a crime. The due process clause does not require a reasonable doubt standard for proof of that possession.

Petitioners also contend that the Act must be declared unconstitutional because it violates their sixth amendment right to a trial by jury in providing for proof of possession of a firearm to the court at sentencing and not to a jury. Brief for Petitioners at 33-38, Argument 3. They argue that the jury must determine all ultimate facts concerning the offense committed. As shown above, however, possession of a firearm is not an element of the crimes enumerated in the Act. It is not an ultimate

18. Indeed, two states have statutory schemes remarkably similar to Pennsylvania's. An intermediate New Jersey appellate court has rejected a due process challenge to that state's preponderance standard in its mandatory minimum sentencing statute. *State v. Gantt*, 186 N.J. Super. 262, 452 A.2d 477 (1982), *aff'd*, 195 N.J. Super. 114, 478 A.2d 422 (App. Div. 1984), *cert. granted* (1985). The Kansas Supreme Court has held that its state's mandatory sentencing law, although silent as to whether possession of a firearm is an element of the offense charged, does not create a new class of crimes. *State v. Mullins*, 223 Kan. 798, 577 P.2d 51 (1978).

fact about the crime, but instead a fact relevant to sentencing. Therefore, the relevant inquiry is whether the sixth amendment requires a sentencing jury.

It is clear that the sixth amendment carries no such requirement. There is no sixth amendment right to jury sentencing. *Spaziano v. Florida*, 104 S.Ct. at 3162; *accord*, *Proffitt v. Florida*, 428 U.S. at 252. Petitioners' argument that this case is distinguishable because the sentencer must make a specific factual determination that may "aggravate" the sentence is unfounded. In *Proffitt*, this Court approved the Florida death penalty procedure in which a judge is the ultimate factfinder at sentencing. Under the Florida statute, proof that a statutory aggravating circumstance exists is necessary to place the defendant within the class of persons eligible for death. *Zant v. Stephens*, 462 U.S. 862, 878 (1983). Many of these aggravating circumstances are facts related to the crime, *e.g.*, the risk of death to others, the commission of a felony along with the murder, and murder for pecuniary gain. *See Proffitt v. Florida*, 428 U.S. at 248 n.6. The factfinding involved in a sentencing hearing under the Act is no different from the factfinding in a death penalty proceeding. The approval of judicial sentencing at a death penalty proceeding dictates approval of judicial sentencing under the Act. The sixth amendment does not require jury sentencing under the Act.

II. WHEN THE PROSECUTION SEEKS TO PROVE RELEVANT FACTS AT A SENTENCING HEARING, DUE PROCESS IS SATISFIED BY APPLICATION OF A PREPONDERANCE OF THE EVIDENCE STANDARD OF PROOF.

Next, petitioners argue that even if possession of a firearm is not an element of the crimes enumerated in the Act, this Court should hold that due process requires proof by at least clear and convincing evidence.

Patterson v. New York, 432 U.S. 197 (1977), answers this argument as it did the preceding one. *Patterson* would sanction a legislative scheme that imposed a mandatory five-year minimum sentence unless the convicted defendant *disproved* his possession of a weapon during the crime. *Supra* at 10-11. *A fortiori*, *Patterson* sanctions the instant statute, which puts the burden of proving gun possession on the prosecution, although by only a preponderance of the evidence.

Even if *Patterson* did not mandate rejection of petitioners' argument, it would be clear from other cases that due process does not require a clear and convincing standard of proof. This Court has repeatedly held that due process in sentencing ". . . does not . . . implicate the entire panoply of criminal trial procedural rights." *Gardner v. Florida*, 430 U.S. 349, 358 n.9 (1977).

> Once it is determined that due process applies, the question remains what process is due . . . due process is flexible and calls for such procedural protections as the particular situation demands . . . Its flexibility is in its scope once it has been determined that some process is due; not all situations calling for procedural safeguards call for the same kind of procedure.

430 U.S. at 359 n.9, quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The statute under review affords convicted defendants the process due at sentencing.

In determining the standard of proof the due process clause requires in a given proceeding, the public interests affected must be weighed against the private interests affected and the risk of error that would adversely affect the private interests. *Santosky v. Kramer*, 455 U.S. 745 (1982). *See also Addington v. Texas*, 441 U.S. 418 (1979). Here, the public interest in protection from dangerous criminal offenders is of paramount importance.

In the opinion below, Chief Justice Nix aptly described the public interest as follows:

> The Commonwealth seeks to protect the public from armed criminals and to deter violent crime and the illegal use of firearms generally, as well as to indicate its interest in punishing those who commit serious crimes with guns. This societal interest is at least as compelling as the defendant's interest in lenient punishment.

Commonwealth v. Wright, 494 A.2d at 362. As this Court observed in rejecting a plea of double jeopardy raised by a defendant who was convicted but had been granted a new trial: "Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial." *United States v. Tateo*, 377 U.S. 463, 466 (1964). *See also Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984).

A convicted defendant's opposing liberty interest, while strong, is no more important than the societal interest in fair and just punishment. Indeed, once the reasonable doubt standard has been used to convict an accused of a crime, society has established its right to punish. *Meachum v. Fano*, 427 U.S. 215, 224 (1976) (". . . given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him . . . so long as the conditions of confinement do not otherwise violate the Constitution."). *See also Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979). Concomitantly, a criminal has no "right" to any sentence within the statutory range. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). Thus, the absence of any right of the criminal to a lesser sentence than the maximum provided by law dictates that his interest not be found to outweigh society's interests.

Further, the risk of erroneous deprivation of an individual's liberty interest is very small. The factfinding at sentencing involves a simple and straightforward issue,

visible possession of a gun. The convicted defendant is protected by the right to counsel, reasonable notice, and a hearing. Where, through use of a reasonable doubt standard, society has already established its right to punish the individual litigant and the criminal has many procedural safeguards at sentencing, the public and private interests are properly balanced by a preponderance of evidence standard. This is what the constitution requires.

The Circuit Courts of Appeals have uniformly rejected due process challenges to the constitutionality of the preponderance of evidence standard under the federal "dangerous special offender statute," which provides an enhanced sentence if the defendant is found to be "dangerous." 18 U.S.C.A §3575(b) (1985). *United States v. Davis*, 710 F.2d 104 (3d Cir), *cert. denied*, 464 U.S. 1001 (1983); *United States v. Schell*, 692 F.2d 672 (10th Cir. 1982); *United States v. Inendino*, 604 F.2d 458, 463 (7th Cir.), *cert. denied*, 444 U.S. 932 (1979); *United States v. Williamson*, 567 F.2d 610, 615 (4th Cir. 1977); *United States v. Bowdach*, 561 F.2d 1160, 1175 (5th Cir. 1977); *United States v. Stewart*, 531 F.2d 326, 334 (6th Cir.), *cert. denied*, 426 U.S. 922 (1976). *See also United States v. Darby*, 744 F.2d 1508, 1535-38 (11th Cir. 1984) (preponderance of the evidence standard under dangerous special drug offender statute, 21 U.S.C.A. §849(c) (1981), does not violate due process); 18 U.S.C.A. §4214(d) (1985) (providing a preponderance standard for parole revocation decisions). *Cf. United States v. Smith*, 571 F.2d 370, 372 (7th Cir. 1978) (standard for revocation of probation is less than a preponderance; court need only be "reasonably satisfied" that the probationer violated the conditions of his probation); *United States v. Manuszak*, 532 F.2d 311, 317 (3d Cir. 1976) (same). The cases upon which petitioners rely, *Santosky v. Kramer*, 455 U.S. 745 (1982), and *Addington v. Texas*, 441 U.S. 418 (1979), both held the clear and convincing standard constitutionally required in order for the State to justify depriving an individual of

rights in the first instance. Neither resembled the instant situation, where the State had already validly justified taking away the individual's right to liberty, and the proceeding at issue merely establishes the duration of the deprivation of liberty within the limits previously set by law.

Furthermore, sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all. Imposition of a clear and convincing evidence standard in the mandatory sentencing context would radically alter well established and long approved sentencing proceedings. This Court has established that a sentence properly may be based on out-of-court information that is not subject to cross-examination. *Williams v. New York*, 337 U.S. 241 (1949). *See also* Brief for Petitioners at 25 n.24 and the authority therein construing the Special Dangerous Offender Act, 18 U.S.C.A. §3575 (1985).

That the legislature has requested the sentencing court to make a specific factual determination that would serve to limit the court's discretion does not alter the character of the proceeding. Petitioners appear to concede that a preponderance of evidence standard in a mandatory sentencing statute for recidivists satisfies due process. Brief for Petitioners at 25 n.24. That a recidivist hearing involves proof of "historical facts" rather than a fact about the severity of the criminal act is not legally significant. Due process is concerned with fairness and reliability. Once the state has established its right to punish, proof by a preponderance of evidence of a fact about the crime is no less fair or reliable than proof of an historical fact.

In the absence of a mandatory sentencing statute, a responsible sentencing court must decide on a sentence based in part on findings about the crime and its severity. A portion of the Pennsylvania Sentencing Code provides that:

> . . . the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant.

42 Pa. Con. Stat. Ann. §9721(b) (Purdon 1982). In the Act, the legislature has given Pennsylvania judges more specific direction as to the weight to be given some of these factors. A sentencing hearing does not become a trial merely because in some cases the weight to be given to the gravity of the crime and need to protect the public deprives the sentencing court of discretion.[19] A sentencing hearing under the Act fully comports the requirements of due process.

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19. *Bullington v. Missouri*, 451 U.S. 430 (1981), does not support petitioners' contrary argument. *Bullington* holds that, under the Missouri death penalty scheme, the double jeopardy clause protects against a second death penalty proceeding where the first hearing resulted in a verdict of life imprisonment rather than death. Obviously, the holding that double jeopardy may bar repeated penalty hearings does not require a clear and convincing standard of proof at sentencing. In Pennsylvania under the Act, if the prosecution fails to prove the prerequisite for mandatory sentencing, then it will not be given a second opportunity to remedy that failure of proof. This protection accorded defendants by *Bullington* is not a constitutional mandate for increasing the burden of proof at sentencing.

CONCLUSION

The judgment of the Supreme Court of Pennsylvania should be affirmed and the case remanded so that petitioners may be sentenced in accordance with the Mandatory Minimum Sentencing Act.

Respectfully submitted,

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Appendix A

42 Pa. Con. Stat. Ann. §9712 (Purdon 1982). Sentences for offenses committed with firearms

(a) Mandatory sentence.—Any person who is convicted in any court of this Commonwealth of murder of the third degree, voluntary manslaughter, rape, involuntary deviate sexual intercourse, robbery as defined in 18 Pa.C.S. § 3701(a)(1)(i), (ii) or (iii) (relating to robbery), aggravated assault as defined in 18 Pa.C.S. § 2702(a)(1) (relating to aggravated assault) or kidnapping, or who is convicted of attempt to commit any of these crimes, shall, if the person visibly possessed a firearm during the commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title or other statute to the contrary.

(b) Proof at sentencing.—Provisions of this section shall not be an element of the crime and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The court shall consider any evidence presented at trial and shall afford the Commonwealth and the defendant an opportunity to present any necessary additional evidence and shall determine, by a preponderance of the evidence, if this section is applicable.

(c) Authority of court in sentencing.—There shall be no authority in any court to impose on an offender to which this section is applicable any lesser sentence than provided for in subsection (a) or to place such offender on probation or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a

sentence greater than that provided in this section. Sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory sentences provided in this section.

(d) Appeal by Commonwealth.—If a sentencing court refuses to apply this section where applicable, the Commonwealth shall have the right to appellate review of the action of the sentencing court. The appellate court shall vacate the sentence and remand the case to the sentencing court for imposition of a sentence in accordance with this section if it finds that the sentence was imposed in violation of this section.

(e) Definition of firearm.—As used in this section "firearm" means any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive or the expansion of gas therein.

1974, Dec. 30, P.L. 1052, No. 345, § 1, effective in 90 days. As amended 1980, Oct. 5, P.L. 693, No. 142, § 401(a), effective in 60 days; 1982, March 8, P.L. 169, No. 54, § 2, effective in 90 days.

REPLY

BRIEF

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1985

DYNEL McMILLAN, LORNA PETERSON
JAMES J. DENNISON, HAROLD L. SMALLS,
Petitioners

V.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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ARGUMENT

I. PROOF BEYOND A REASONABLE DOUBT IS CONSTITUTIONALLY REQUIRED

A.

In support of its assertion that the Constitution does not require proof beyond a reasonable doubt of the critical factual determination triggering application of 42 Pa. Cons. Stat. § 9712 (Purdon 1982) ("the Act"), respondent claims that the Act does not increase punishment (Res. Br. 4,7, 8, n. 14).

Respondent does recognize that, pursuant to Pennsylvania statutory law. the Act's mandated five year minimum sentence requires the court to impose a maximum sentence of at least ten years imprisonment and that parole may not be granted until after five years of imprisonment[1] (Res. Br. 5). By contrast, a defendant sentenced pursuant to Pennsylvania's discretionary scheme for any of the enumerated offenses may receive even a probationary sentence. *See, e.g., Commonwealth v. Vanderhost*, 501 A.2d 262 (Pa. Super. 1985). The increased punishment that results by operation of the Act is made manifest by a comparison of the range of possible minimum and maximum sentences available to the sentencing court when sentence

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[1]See Pet. Br. 10-11, and Res. Br. 5, for an explanation of the statutory basis for this result. Respondent notes that statutes provide that a defendant may receive a more restrictive form of release before becoming eligible for parole (Res. Br. 5, n. 10). However, a defendant must serve at least half of his minimum sentence to even be eligible for such pre-release (37 Pa. Admin. Code § 94.3), and only about four per cent of prisoners obtain pre-release. See Commonwealth of Pennsylvania Bureau of Correction, *Annual Report 1984*, 11, 23.

is imposed pursuant to the discretionary scheme (for the enumerated felonies) and when the Act is applied.[2]

Robbery, rape, third degree murder, kidnapping, involuntary deviate sexual intercourse (20 year maximum sentence).

	Minimum Sentence	*Maximum Sentence*
Discretionary Scheme:	0-10 years	0-20 years
Mandatory Act:	5-10 years	10-20 years

Aggravated assault, voluntary manslaughter or the attempt to commit any of the offenses enumerated in the Act (10 year maximum sentence).

	Minimum Sentence	*Maximum Sentence*
Discretionary Scheme:	0-5 years	0-10 years
Mandatory Act:	5 years	10 years

---

[2]That the difference in potential punishment between Pennsylvania's discretionary sentencing scheme and the Act is no mere hypothetical matter is demonstrated by petitioners' cases. The increase in punishment and imprisonment for petitioner Dennison would be the most dramatic.

	Minimum Sentence	*Maximum Sentence*
Discretionary Scheme Sentence Imposed:	11½ months	23 months
If Mandatory Act Applied	5 years	10 years
Increase If Mandatory Act Applied	4 yrs. ½ month	8 yrs. 1 month

The sentence imposed pursuant to the Act would therefore be in excess of five times that actually imposed on Dennison pursuant to Pennsylvania's discretionary sentencing scheme.

In *Hicks v. Oklahoma*, 447 U.S. 343 (1980), this Court rejected a state's claim, similar to that of respondent, that a mandatory sentencing statute had not increased Hicks' punishment since the mandatory sentence he received under it was within the maximum permitted under the state's discretionary sentencing scheme. This Court held that Hicks had a due process right to resentencing even though the sentence imposed on him under an invalidated mandatory law was within the maximum that might have been inflicted if the mandatory law had not been applied in his case. This Court recognized that the difference in punishment between the mandatory and discretionary schemes was constitutionally significant, and it is clear that the differences between Pennsylvania's sentencing schemes likewise generate a constitutional liberty interest. The Act's very purpose was to provide for increased punishment for criminal activity committed with visibly possessed firearms, and it is apparent that the penalty provisions of the Act achieve that purpose.

B.

Respondent also contends that proof beyond a reasonable doubt is not required because the Pennsylvania legislature has explicitly stated that the factual determination necessary to invoke the Act — visible possesion of a firearm while committing the criminal activity — is not an element of the offense (Res. Br. 4,8). This claim trivializes both *Mullaney v. Wilbur*, 421 U.S. 684 (1975), which rejected such a formalistic approach of beginning and ending constitutional analysis by looking only at a state's definitions of crime, and *In Re Winship*, 397 U.S. 358 (1970), which "requires an analysis that looks to the operation and effect of the law as applied and enforced by the state. . . ." *Mullaney v. Wilbur*, 421 U.S. at 699.

Respondent attempts to avoid these well settled principles by repeatedly asserting that the Act makes "possession of a firearm *merely a fact* relevant to sentencing in the enumerated felonies" (emphasis added) (Res. Br. 4. *See* Res. Br. 6,7,11,12,13). This claim does not accurately describe the operation and effect of the Act; it is, instead, a description of the Pennsylvania statutory discretionary scheme which the Act has supplanted. That discretionary scheme requires a court to consider all relevant facts regarding the nature and circumstances of the crime, and the history, character and condition of the defendant.[3]

Under Pennsylvania's discretionary sentencing scheme, possession of a firearm would merely be a fact relevant to sentencing, along with several other factors. A court could not consider only that fact at sentencing, and mechanically impose a sentence of at least five to ten years imprisonment in every case where that fact was present, without consideration of the individual circumstances of the defendant. Such judicial disregard of the discretionary sentencing scheme would constitute an abuse of discretion. *Commonwealth v. Martin*, 466 Pa. 118, 351 A.2d 650 (1976).[4]

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[3]See 42 Pa. Cons. Stat. Ann. §§ 9721-9725 (Purdon 1982).

[4]Federal appeals courts have consistently reached the same conclusion that in a discretionary sentencing scheme a judge may not impose a uniform sentence of imprisonment based only on the offense committed. *United States v. Lopez-Gonzales*, 688 F.2d 1275 (9th Cir. 1982); *United States v. Hartford*, 489 F.2d 652 (5th Cir. 1974); *Woosley v. United States*, 478 F.2d 139 (8th Cir. 1973) (en banc); *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971); *United States v. McCoy*, 429 F.2d 739 (D.C. Cir. 1970).

Contrary to respondent's claim, the Act converts the fact of visible possession of a firearm from *a* fact relevant at sentencing to *the* fact which conclusively determines whether a defendant is to be subjected to a different, and far more onerous, scheme of punishment. Respondent's assertion that the Act "does not alter the character of the proceeding" (Br. 17) is simply not true.[5] In operation and effect the Act creates a greater offense (e.g., assault with a firearm), where before there existed only the unitary lesser offense (e.g., assault).

C.

Respondent's assertion that the state did not have to assume any burden at all, and instead could have placed on the defendant the burden to disprove by a preponderance of the evidence that he possessed a firearm to avoid a mandatory sentence of imprisonment (Res. Br. 10,11,14). is without any support.

If respondent's hypothetical statutory scheme were constitutional, then so too would be a mandatory sentencing scheme where the defendant had to disprove possession of a firearm beyond a reasonable doubt to avoid the

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[5]Respondent concedes that the Act has radically altered the character of the usual sentencing proceeding by its concession that *Bullington v. Missouri*, 451 U.S. 430 (1981), is applicable to sentencing proceedings held pursuant to the Act. It concedes that the double jeopardy clause would bar a second sentencing hearing if the state failed to prove the prerequisite facts for application of the Act at an initial sentencing hearing (Res. Br. 18, n. 19). The Double Jeopardy Clause does not usually apply to sentencing proceedings, and the principal basis for the decision in *Bullington* was that the sentencing proceeding was sufficiently different from the usual discretionary sentencing hearing and sufficiently like a trial on guilt or innocence to invoke the protections of the double jeopardy clause.

mandatory penalty. *See Leland v. Oregon,* 343 U.S. 790 (1952). It is also clear that if all critical facts could, as respondent suggests, just be converted to mitigating facts, the legislature could also simply reverse the critical facts and constitutionally promulgate a statute such as the following one:

> Any person illegally possessing a firearm is guilty of a felony of the second degree and shall be sentenced to a mandatory five to ten years imprisonment unless the defendant establishes by a preponderance of the evidence that his possession of the firearm was not during the course of committing a robbery.

Respondent is correct in asserting that with the passage of the Act "it is apparent that the Pennsylvania legislature sought to punish and deter particular crimes" (Res. Br. 10, n. 16). The Act and the hypothetical statutes all provide for increased stigma and punishment for the commission of criminal activity while armed with a firearm, and each suffers from the same constitutional infirmity. A state legislature has the right to make the substantive choice of identifying the criminal conduct it wishes to punish and setting the punishment to be imposed when that conduct is proved by the state. However the due process clause does not permit it the procedural choice of avoiding, in any way, the *Winship* reasonable doubt requirement for the critical facts defining that criminal conduct. *See Leary v. United States,* 395 U.S. 6, 34 (1969); *United States v. Romano,* 382 U.S. 136, 144 (1965); *Tot v. United States,* 319 U.S. 463, 472 (1943); Ashford & Risinger, *Presumptions, Assumptions, and Due Process In Criminal Cases: A Theoretical Overview,* 79 Yale. L.J. 165 (1969); Saltzburg, *Burdens of Persuasion in Criminal*

Cases: Harmonizing the Views of the Justices, 20 Am. U.L. Rev. 393 (1983).

Patterson v. New York, 432 U.S. 197 (1977), held that a state has no constitutional obligation to disprove beyond a reasonable doubt all affirmative defenses (432 U.S. at 210), but this Court did not hold, as respondent urges with its analysis, that a state could characterize any factual determination as an affirmative defense or mitigating circumstance and thus avoid proving beyond a reasonable doubt the factual determination so characterized. Rather, *Patterson* and *Morrison v. California,* 291 U.S. 82 (1934), both recognized that the question is whether the state has proved enough to make it just to require the defendant to repel what has been proved with excuse or justification.[6] *Patterson* also held that a state which recognizes

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[6]*Patterson,* 432 U.S. at 203, n. 9; *Morrison,* 291 U.S. at 88-89. The burden may be placed on a defendant to come "within a rule which has the effect of an exception." *Morrison,* 291 U.S. at 88.

Respondent contends that there is no constitutional distinction between its hypothetical statute (see page 5, *supra*) and a factual determination of inoperability being recognized as a mitigating circumstance in an armed robbery statute, with the burden placed on the defendant. Res. Br. 11, n. 17. The difference is that the latter statute provides for a new ameliorative exception. See *Patterson,* 432 U.S. at 229, n. 14 (dissenting opinion). After the state has established all facts beyond a reasonable doubt, including possession of a firearm, it permits the defendant to establish that, unlike most guns, his gun was not capable of functioning. Proof of robbery or any of the enumerated offenses under the Act establishes nothing whatsoever with respect to the issue of whether a firearm, other instrumentality, or any instrumentality at all was involved in the offense. Placing the burden of proof on the defendant would not be carving out a factual exception to what the state has already proved, but would be forcing the defendant to disprove a fact historically and consistently recognized as an element of the offense which requires proof by the state beyond a reasonable doubt (Pet. Br. 17-19, Appendices A-C).

a mitigating factor need not disprove its existence beyond a reasonable doubt if in its judgment it would be too cumbersome, expensive or inaccurate. Respondent offers no reasons whatsoever why the state should be permitted to place the burden on the defendant or to have any lesser burden of proof than beyond a reasonable doubt for the factual determination involved in this Act, which is neither an excuse nor an explanation. Respondent does not cite to a single jurisdiction that has ever adopted a form of its hypothetical "mitigating circumstances" statute.

Historically, the legislatively specified factual issue of whether a defendant possessed a firearm during the commission of criminal activity has been consistently recognized as an element of the offense, requiring proof by the state beyond a reasonable doubt. *See* Pet. Br. 17-19, Appendices A-C. In essence, respondent's position is that it is constitutionally permissible to put the burden on the defendant to disprove any element of the offense simply by labeling it a mitigating factor. The hypothetical statute posed by respondent, rather than supporting respondent's argument, demonstrates the unfortunate erosion of procedural due process possible if this Court sustains the constitutionality of the Act.

II. AT A MINIMUM, PROOF BY CLEAR AND CONVINCING EVIDENCE IS CONSTITUTIONALLY REQUIRED

A.

If proof beyond a reasonable doubt is not found to be constitutionally required, this Court should nevertheless reject respondent's contention that a preponderance of

the evidence standard is constitutionally adequate. Respondent's principal argument is based on the fact that a defendant has no right to a particular sentence (Res. Br. 4,15) and that society has an interest in protecting the public from dangerous criminals (Res. Br. 4,15,16). These unremarkable propositions simply divert attention from the proper constitutional inquiry.

This Court long ago rejected a due process analysis that depends on whether the individual has a right to have what the government wishes to take away, whether it be freedom or property.[7] No litigant has a right to a specific outcome, including, of course, a defendant at trial, who has no right to a not guilty verdict. Yet the defendant does have a constitutional right not to be convicted unless the factfinder has been convinced beyond a reasonable doubt that the requisite facts have been established. Similarly, a "defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Gardner v. Florida,* 430 U.S. 349, 358 (1977) (plurality opinion). *See also Eddings v. Oklahoma,* 455 U.S. 104, 116 (1982); *Bullington v. Missouri,* 451 U.S. at 446. Obviously, the question of the burden of proof constitutionally required to establish the factual determination which results in a mandatory term of five to ten years imprisonment is not answered at all by respondent's assertion that the defendant has no right to a particular sentence.[8]

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[7] *E.g., Morrissey v. Brewer,* 408 U.S. 471, 481 (1972); *Graham v. Richardson,* 403 U.S. 365, 374 (1971).

[8] Respondent recognizes, as it must, that due process rights do apply at a sentencing proceeding (Res. Br. 14,18).

Respondent seeks to minimize the importance for the defendant of the outcome of proceedings pursuant to the Act. It contends that the Act "merely establishes the duration of the deprivation of liberty within the limits previously set by law" (Res. Br. 17). It is clear however that the stakes for a defendant are high and that the mandatory term of five to ten years of imprisonment is a significant loss of liberty occasioned by application of the Act. See *supra*, 1-3; Pet. Br. 10-12.

As did the Pennsylvania Supreme Court in its opinion below,[9] respondent urges that, given the societal interest in protecting against individuals who illegally use firearms to commit serious crimes, the preponderance standard of proof is adequate because this societal interest balances equally with the defendant's liberty interest. Respondent's societal interest test is invalid because it is based on a principle rejected by this Court, that the constitutional procedural rights of a defendant in a criminal prosecution should be diminished as the criminal activity alleged by the state (and thus the penalties provided by the state) becomes more serious.[10]

The societal interest in punishing defendants for the criminal conduct for which they have already been convicted will of course be fully served by their being punished pursuant to the discretionary scheme if the Act is not applied. Beyond this punishment, both the defendant and society have a compelling interest in the correct de-

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[9]Pet. App. 16a-17a.

[10]*See, e.g., Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

termination of additional critical facts which, if found, would result in the imprisonment of the individual for a period of at least five to ten years. Society has an interest that a defendant not be unnecessarily and improperly imprisoned for a mandated five to ten years on the basis of a burden of proof which leaves too much room for error.

B.

Respondent makes the curious argument that the preponderance burden of proof should not be of any constitutional concern because the risk of error "is very small" (Res. Br. 4,15). This claim is raised even though this Court has recognized that the preponderance standard is one "which leaves the issue in doubt."[11] Obviously, among the various burdens of proof, the preponderance standard creates the greatest risk of error and a constitutionally mandated intermediate standard of clear and convincing evidence would reduce the risk of erroneous decisions.[12]

> A standard of proof that by its very nature demands consideration of the quantity, rather than the quality, of the evidence may misdirect the factfinder in the marginal case. See *In Re Winship*, 397 U.S. at 371, n. 3, 90 S.Ct., at 1076, n. 3 (Harlan, J., concurring). *Santosky v. Kramer*, 455 U.S. at 764.

Criminal trials generally concern straightforward, objective, clearcut, factual determinations, rather than the

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[11]*Schneiderman v. United States*, 320 U.S. 118, 125 (1943); *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325, 381 (1889).

[12]See *Addington v. Texas*, 441 U.S. 418, 425 (1979).

subjective judgmental characterizations based on a consideration of many factors which are involved in discretionary sentencing and proceedings such as involuntary commitment. See *Addington v. Texas,* 441 U.S. 418 (1979). However, the relative simplicity of such objective factual determinations concerning whether or not alleged criminal conduct was committed does not make those determinations less risky in terms of possible mistakes in outcome. Given witnesses with opposing versions of what happened and with differing abilities to observe and relate what was observed, issues of credibility are often involved in determining what to find as a fact concerning any event not captured on film for instant replay.[13]

The factual determinations involved in application of the Act for which there is a risk of error are the following:

(1) Did the defendant *possess* an object?

(2) Was the object *visibly* possessed?

(3) Was the object a *firearm?*

(4) Was the visible possesion of the firearm *during the commission of the offense?*

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[13]*See In Re Winship,* 397 U.S. at 370 (Harlan, J., concurring). The risk of error for such events is clearly more than for the assessment of facts concerning whether a defendant was a recidivist which is a historical determination which usually involves only tangible court records. *See, e.g., United States v. Bowdach,* 561 F.2d 1160 (5th Cir. 1977). Whether this, or any other difference between the factual determinations involved in this Act and a recidivist act, is constitutionally significant in assessing the mandated burden of proof need not be decided by this Court. Contrary to respondent's claim that petitioner has conceded that a preponderance standard is constitutionally adequate for a recidivist determination (Res. Br. 17) no such concession has been made. See Pet. Br. 33, n. 37. *See also, People v. Reese,* 258 N.Y. 89, 179 N.E. 305 (1932) (Cardozo, J.).

Errors may occur with respect to any of these four factual determinations, just as they may occur with the factual determinations involved in any criminal offense prohibiting the possession of a firearm. As the American Bar Association noted in discussing mandatory sentencing statutes dependent on proof of factual determinations such as use of a weapon, such "factors are subject to obvious dispute."[14]

C.

Respondent contends that recognizing a due process right for the factual determinations involved in applying the Act "would radically alter well established and long approved sentencing proceedings" (Res. Br. 17). This statement is supported only by a claim that this Court has established that a sentence may be based on out-of-court information not subject to cross-examination, with a citation to *Williams v. New York,* 337 U.S. 241 (1949). But respondent fails to even cite *Specht v. Patterson,* 386 U.S. 605 (1967), where this Court subsequently held that sentencing proceedings like the instant one, dependent solely on a new factual determination, present a "radically different situation"[15] to which *Williams* is not to be extended and that the defendant has the right to confront and cross-examine adverse witnesses at such a sentencing hearing.

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[14]A.B.A. Standards, *Sentencing Alternatives and Procedures,* Standard 18-6.5, Commentary at 18.471 (1980 Ed).

[15]386 U.S. at 608. Respondent admits that the proceeding is radically different from the usual discretionary sentencing hearing and is solely dependent on a new factual determination by its concession that *Bullington v. Missouri* and double jeopardy protections, apply to proceedings under the Act. Res. Br. 18, n. 19. See *supra,* 5, n. 5.

Respondent certainly cannot claim that this Court has ever sanctioned a loss of liberty dependent solely on a factual determination made on the basis of proof by a preponderance of the evidence. *See In Re Winship; Addington v. Texas,* 441 U.S. 418 (1979). *See also, Vance v. Terrazas,* 444 U.S. 252, 266 (1980). Nor does it, nor can it, assert that the use of a preponderance of the evidence standard for such a factual determination in an increased punishment scheme is well established or long approved in this country (See Pet. Br. 18, n. 14; 19, n. 16). Thus, neither precedent nor practice supports respondent's position.

This Court has held that "practical considerations may limit a constitutionally based burden of proof . . ." *Addington v. Texas,* 441 U.S. at 130. Respondent, however, offers not a single reason why the state would be unfairly burdened if it had to meet a standard of proof greater than that applied in an ordinary negligence case[16] in order to obtain the mandatory term of imprisonment of from five to ten years. A burden of proof of clear and convincing evidence would not change the nature of the sentencing hearing except to instruct the factfinder that a greater degree of confidence is necessary in the correctness of the factual conclusions,[17] and that society has more than a minimal concern[18] that an error may occur in factfinding.

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[16]*See In Re Winship,* 397 U.S. at 368, n. 6 (citation omitted).

[17]See *In Re Winship,* 397 U.S. at 370 (Harlan, J., concurring).

[18]See Santosky v. Kramer, 455 U.S. at 755.

Given the deprivation of liberty occasioned by a mandatory term of imprisonment of at least five to ten years if the Act is found to be applicable, and the lack of any legitimate state interest justifying the preponderance burden of proof, this Court should hold that the due process clause requires that the risk of error must be minimized by the state by employing at least a "clear and convincing" standard of proof.

III. A JURY DETERMINATION OF THE FACTS IS CONSTITUTIONALLY REQUIRED

Respondent misperceives petitioners' claim as being one for jury sentencing (Res. Br. 12-13). On the contrary, historically juries have determined the legislatively specified facts[19] at trial.[20]

Respondent relies on *Spaziano v. Florida,* 104 S.Ct. 3154 (1984), which held that there was no right to have a jury decide whether a death penalty should be imposed. The death penalty sentencing determination, like the usual sentencing determination, is one which is required to be individualized, with consideration given to the particular

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[19]Such facts, which operate to define the activity constituting a punishable offense, are to be contrasted with those that are pertinent only to the application of a substantive federal constitutional limitation upon the power of the state to punish. *See Cabana v. Bullock,* 54 U.S.L.W. 4105 (U.S., January 22, 1986). The latter have never been thought subject to jury trial. *See, e.g., Edwards v. South Carolina,* 372 U.S. 229 (1963).

[20]In fact, every jurisdiction which has held that there is a right to a jury determination of the critical facts concerning the offense committed, on which an enhanced punishment is to depend, have provided for that determination at trial. *See* Pet. Br. 37, n. 44, n. 45. *See also, Commonwealth v. Walker,* 501 A.2d 1143, 1145 (Pa. Super, 1985).

offender and offense, and to a substantial array of factors, in arriving at a sentencing decision utilizing guided discretion. [21]

The finding of facts is only the first step in the individualized capital sentencing process. A legislative enactment providing for a mandatory death penalty based solely on facts concerning the crime committed would be unconstitutional.[22] Thus, counsel for Spaziano acknowledged that he could not even raise the issue squarely presented here. "Petitioner does not urge that capital sentencing is so much like a trial on guilt or innocence that it is controlled by the Court's decision in *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)." *Spaziano v. Florida*, 104 S.Ct. at 3161.

Respondent asserts, incorrectly, that possession of a firearm during the commission of the criminal act "is not an ultimate fact about the crime, but instead a fact relevant to sentencing" (Res. Br. 12-13). Precisely because it is an "ultimate" legislative fact about the crime which, if established, conclusively requires the imposition of a sentence of imprisonment of at least five to ten years, *Duncan v. Louisiana* and the Sixth Amendment should be held to require the state to afford the defendant a jury determination of the issue. The jury would not be sentencing, but simply performing its usual function of determining whether the criminal activity which the state seeks to punish has occurred.

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[21] *See, e.g., Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion).

[22] *See, e.g, Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion); *Roberts v. Louisiana*, 431 U.S. 633 (1977) (per curiam).

CONCLUSION

For each of the foregoing reasons, as well as for the reasons set forth in our opening brief, it is respectfully submitted that 42 Pa. Cons. Stat. Ann. § 9712 (1982 Purdon) is unconstitutional, and that the judgment of the Pennsylvania Supreme Court should be reversed.

Respectfully submitted,

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